INDIANA LAW REVIEW

INDIANA UNIVERSITY
SCHOOL OF LAW–INDIANAPOLIS
IUPUI

Volume 43 No. 4 2010

Indiana Law Review

Volume 43 2009-2010

INDIANA LAW REVIEW

(ISSN 0090-4198)

Published four times a year by Indiana University. Editorial and Business Offices are located at:

Indiana Law Review
Lawrence W. Inlow Hall
530 W. New York Street
Indianapolis, IN 46202-3225
(317) 274-4440

Subscriptions. Current subscription rates for an academic year are $30.00 (domestic mailing) and $35.00 (foreign mailing) for four issues. Unless the Business Office receives notice to the contrary, all subscriptions will be renewed automatically. ***Address changes must be received at least one month prior to publication to ensure prompt delivery and must include old and new address and the proper zip code.***

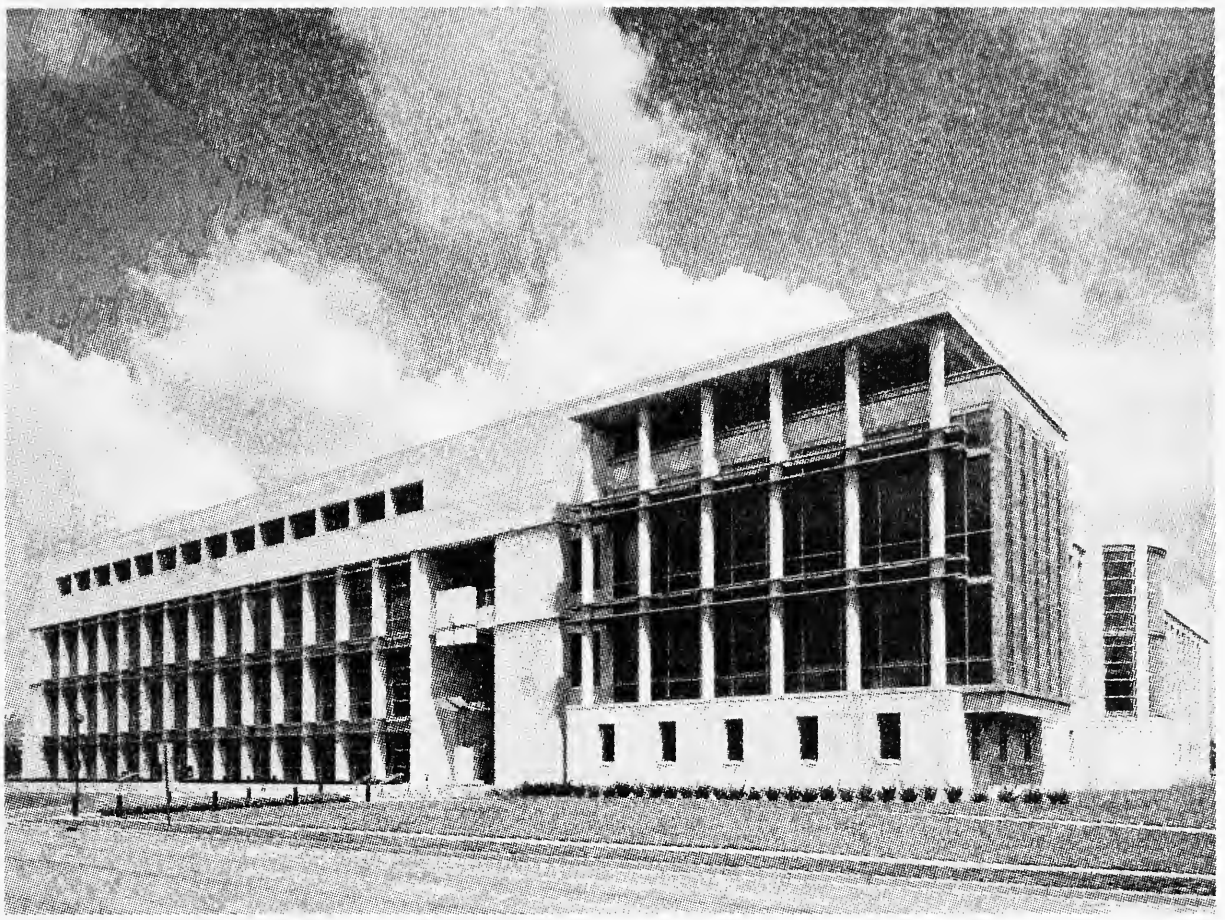
Single and Back Issues. Current single regular issues may be obtained from the *Indiana Law Review* Business Office for $10.00. Current Survey issues may be purchased for $20.00. The Symposium Issue may be purchased for $15.00. Please enclose payment with order. Claims for nonreceipt of current year's issues must be made within six months of the mailing date. Back issues may be ordered from: William S. Hein & Co., Inc., 1285 Main St., Buffalo, NY 14209-1987, (800) 828-7571, (716) 883-8100 fax, mail@wshein.com (e-mail for orders). Back issues are also available in an image-based format through HeinOnline, www.heinonline.org and Ebsco Publishing, www.ebscohost.com.

Manuscripts. The *Indiana Law Review* invites submission of unsolicited manuscripts. All citations should conform to *The Bluebook A Uniform System of Citation* (18th ed. 2005). Manuscripts should be double-spaced with standard one-inch margins. The *Indiana Law Review*, as a matter of policy, promotes the use of gender-neutral language, and alternate use of the female or male pronoun is intended to refer to both female and male.

The INDIANA LAW REVIEW (ISSN 0090-4198) is the property of Indiana University and is published quarterly by the Indiana University School of Law—Indianapolis, which assumes complete editorial responsibility thereof. Current subscription rates for an academic year are: one year domestic $30.00; foreign $35.00. Send all correspondence to Editorial Specialist, *Indiana Law Review*, Indiana University School of Law—Indianapolis, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225. Publication office: 530 W. New York Street, Indianapolis, Indiana 46202-3225. Periodicals postage paid at Indianapolis, Indiana 46201.

POSTMASTER: Send address changes to INDIANA LAW REVIEW, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225.

The entire text of this Law Review is printed on recycled paper.



Please enter my subscription
to the
INDIANA LAW REVIEW

Name _____

Address _____

_____

_____

Enclosed is $_____ for _____ subscription(s)

Mail to: ATTN: Editorial Specialist
at
INDIANA LAW REVIEW
INDIANA UNIVERSITY SCHOOL OF LAW—INDIANAPOLIS
Lawrence W. Inlow Hall
530 West New York Street
Indianapolis, Indiana 46202-3225

For an *academic* year, the subscription rate for four issues is:
Domestic, $30; Foreign, $35; Student, $20

Single Issue, $10; Survey Issue $20
Symposium Issue, $15

Indiana International & Comparative Law Review

The *Indiana International & Comparative Law Review*, published by the Indiana University School of Law - Indianapolis since 1991, is a student-edited law journal that provides a forum for the discussion and analysis of contemporary issues in public and private international law. The *Review* publishes articles by prominent legal scholars, practitioners, and policy makers from around the world, as well as student-written notes and comments.

The *Review* is published twice annually, with a periodic third issue devoted to a specific topic in international or comparative law. In 1994, in conjunction with the Italian Academy for Advanced Studies in America at Columbia University, the *Review* published a special issue on the political and social aspects of Italian law. In 1996, the *Review* published an issue addressing various aspects of Chinese law.

_____

Name

_____

School/Firm/Business

_____

Address

_____

City, State, Zip Code

Subscriptions within the U.S. are $18.00 per year and outside the U.S. are $21.00 per year. I enclose $_____for_____subscription(s) to the *Indiana International & Comparative Law Review*. Please make your check payable to *Indiana International & Comparative Law Review*.

Mail to: Executive Production Editor
Indiana International & Comparative Law Review
Lawrence W. Inlow Hall
530 West New York Street
Indianapolis, Indiana 46202

In 2003, Indiana University School of Law - Indianapolis established a specialty law review focused specifically on health care law and policy:

INDIANA HEALTH LAW REVIEW

The scope of the INDIANA HEALTH LAW REVIEW includes bioethics, malpractice liability, managed care, anti-trust, health care organizations, medical-legal research, legal medicine, food and drug, and other current health-related topics.

Detach and mail this subscription form today to receive future issues

Subscription Price: $20.00

- Two (2) Issues
- Automatic Renewal
- Foreign Mailing Is Extra

Mail form to:

Indiana Health Law Review
Indiana University School of Law – Indianapolis
Attn: Executive Business Editor
Lawrence W. Inlow Hall, Room 136C
530 W. New York Street
Indianapolis, IN 46202-3225

Questions?

Email: ihlr@iupui.edu
Phone: (317) 278-9519
www.indylaw.indiana.edu/~ihlr

Mailing Address:

Name/Title _____
Company/School _____
Address _____
_____
City _____ State ___ ZIP_____
Email _____

Payment Method: ☐ Enclosed
(Make Check Payable to
INDIANA HEALTH LAW REVIEW)

☐ Bill Me Later

Indiana University School of Law—Indianapolis

2009-2010 ADMINISTRATIVE OFFICERS AND FACULTY

Administrative Officers

MICHAEL A. MCROBBIE, *President of the University.* Ph.D., Australian National University.

CHARLES R. BANTZ, *Chancellor, Indiana University-Purdue University—Indianapolis.* B.A., M.A., University of Minnesota; Ph.D., The Ohio State University.

GARY R. ROBERTS, *Dean and Gerald L. Bepko Professor of Law.* B.A., Bradley University; J.D., Stanford University.

PAUL N. COX, *Vice Dean and Centennial Professor of Law.* B.S., Utah State University; J.D., University of Utah; LL.M., University of Virginia.

JAMES P. NEHF, *Associate Dean for Graduate Studies and Cleon H. Foust Fellow; Professor of Law and John S. Grimes Fellow.* B.A., Knox College; J.D., University of North Carolina Law School.

CLAIRE GROVE, *Assistant Dean for Graduate Studies.* B.A., Indiana University; J.D., Indiana University School of Law—Indianapolis.

JONNA KANE MACDOUGALL, *Assistant Dean for Institutional Advancement.* B.A., M.A., Indiana University; J.D., Indiana University School of Law—Indianapolis.

CHASTITY THOMPSON, *Assistant Dean for Professional Development.* A.S., B.A., Alabama State University; M.B.A., Auburn University; J.D., Indiana University School of Law—Indianapolis.

ELIZABETH ALLINGTON, *Director for External Affairs.* B.A., Indiana University; M.A., M. Phil., New York University.

TERESA (TERRI) J. CUELLAR, *Director of Technology Services.* B.S., St. Bonaventure University, New York.

JOYCE M. HERTKO, *Director of Major Gifts.* B.A., Knox College; M.S., Western Illinois University; Ph.D., Indiana University.

AMANDA KAMMAN, *Director for Development.* B.A., Indiana University.

PATRICIA K. KINNEY, *Director of Admissions.* B.S., Purdue University; J.D., Indiana University School of Law—Indianapolis.

VIRGINIA MARSCHAND, *Director of Administrative and Fiscal Affairs.* B.A., M.P.A., Indiana University; J.D., Indiana University School of Law—Indianapolis.

HEATHER MCCABE, *Director, Public Health Law Program, William S. and Christine S. Hall Center for Law and Health.* B.A., M.S.W., Indiana University; J.D., Indiana University School of Law—Indianapolis.

SONJA RICE, *Egypt Program Director.* B.A, Purdue University; J.D., Indiana University School of Law—Indianapolis.

LAWANDA W. WARD, *Director of Pro Bono Program and Public Interest.* B.A., Murray State University; M.A., Illinois State University; M.S., Old Dominion University; J.D., Indiana University School of Law—Indianapolis.

TAMARA MCMILLIAN, *Associate Director of Professional Development.* B.A., Southern Illinois University—Carbondale; M.S.W., Southern Illinois State University—Carbondale; J.D., DePaul University College of Law

SUSIE AGNEW, *Assistant Director of Student Services.* Clark College.

WILLIAM J. BAKER, *Assistant Director of Technology Services.*

KAREN H. MILLER, *Assistant Director for Admissions.* Midway College.

LISA SCHRAGE, *Assistant Director for Donor Relations.* B.S., Marian College.

Faculty

CYNTHIA M. ADAMS, *Clinical Professor of Law and Co-Director of the Latin American Law Program.* B.A., Kentucky Wesleyan College; J.D., Indiana University School of Law—Indianapolis.

JUDITH FORD ANSPACH, *Professor of Law and Director, Ruth Lilly Law Library.* B.S., M.L.S., Kent State University; J.D., Mississippi College School of Law.

CYNTHIA BAKER, *Clinical Associate Professor of Law and Director, Program on Law and State Government.* B.A., J.D., Valparaiso University.

GERALD L. BEPKO, *Indiana University-Purdue University—Indianapolis Chancellor Emeritus, Indiana University Trustee Professor and Professor of Law.* B.S., Northern Illinois University; J.D., ITT/Chicago-Kent College of Law; LL.M., Yale Law School.

SHAWN BOYNE, *Associate Professor of Law and Dean's Fellow.* B.A., Cornell University; M.B.A., University of Minnesota, J.D., University of Southern California's Gould School of Law, M.A., University of Wisconsin, L.L.M., Justus-Liebig-Universtat.

KAREN E. BRAVO, *Associate Professor Law; John S. Grimes Fellow and Dean's Fellow.* B.A., The University of the West Indies; J.D., Columbia University School of Law; LL.M., New York University School of Law.

ROBERT BROOKINS, *Professor of Law.* B.S., University of South Florida; J.D., Ph.D., Cornell University.

KENNETH D. CHESTEK, *Clinical Associate Professor of Law.* B.A., Pennsylvania State University; J.D., University of Pittsburgh School of Law.

DANIEL H. COLE, *R. Bruce Townsend Professor of Law.* A.B., Occidental College; A.M., University of Chicago; J.D., Lewis and Clark Law School; J.S.M., J.S.D., Stanford Law School.

JEFFREY O. COOPER, *Associate Professor of Law.* A.B., Harvard University; J.D., University of Pennsylvania Law School.

ERIC DANNENMAIER, *Associate Professor of Law and Dean's Fellow.* B.A., Drury College; J.D., Boston University; LL.M., Columbia University; M. St., Oxford University.

JAMES D. DIMITRI, *Clinical Professor of Law.* B.S., Indiana University; J.D., Valparaiso University School of Law.

JENNIFER A. DROBAC, *Professor of Law and Director, Central and Eastern European Law Summer Program.* B.A., M.A., Stanford University; J.D., J.S.D., Stanford Law School.

GEORGE E. EDWARDS, *Carl M. Gray Professor of Law; Faculty Advisor to the LL.M. Track in International Human Rights Law; Director, Program in International Human Rights Law and John S. Grimes Fellow.* B.A., North Carolina State University; J.D., Harvard Law School.

FRANK EMMERT, *John S. Grimes Professor of Law and Executive Director, Center for International and Comparative Law.* Erstes Juristisches Staatsexamen (J.D.), University of Munich Law School; LL.M., The University of Michigan Law School; Ph.D., University of Maastricht; Diploma, European University Institute.

NICHOLAS GEORGAKOPOULOS, *Harold R. Woodard Professor of Law.* Ptyhion Nomikis, Athens University School of Law; LL.M., S.J.D., Harvard Law School.

CARRIE HAGAN-GRAY, *Clinical Associate Professor of Law.* B.A., University of Kansas; J.D., University of Cincinnati, College of Law.

JOHN LAWRENCE HILL, *Professor of Law; Adjunct Professor of Philosophy and John S. Grimes Fellow.* B.A., Northern Illinois University; J.D., Ph.D., Georgetown University.

LINDA KELLY HILL, *M. Dale Palmer Professor of Law.* B.A., J.D., University of Virginia.

MAX HUFFMAN, *Associate Professor of Law and Dean's Fellow.* B.A., Cornell University, J.D., University of Chicago College of Law.

LAWRENCE A. JEGEN, III, *Thomas F. Sheehan Professor of Tax Law and Policy.* A.B., Beloit College; J.D., M.B.A., The University of Michigan; LL.M., New York University School of Law.

ROBERT A. KATZ, *Professor of Law and John S. Grimes Fellow.* A.B., Harvard College; J.D., University of Chicago Law School.

ELEANOR D. KINNEY, *Hall Render Professor of Law, Co-Director of the William S. and Christine S. Hall Center for Law and Health.* B.A., Duke University; M.A., University of Chicago; J.D., Duke University School of Law; M.P.H., University of North Carolina.

ANDREW R. KLEIN, *Paul E. Beam Professor of Law.* B.A., University of Wisconsin; J.D., Emory University School of Law.

NORMAN LEFSTEIN, *Professor of Law and Dean Emeritus.* LL.B., University of Illinois College of Law; LL.M., Georgetown University Law School.

MARÍA PABÓN LÓPEZ, *Professor of Law and Dean's Fellow.* B.A., Princeton University; J.D., University of Pennsylvania Law School.

GERARD N. MAGLIOCCA, *Professor of Law; Co-Director, Chinese Law Summer Program and John S. Grimes Fellow.* B.A., Stanford University; J.D., Yale Law School.

ALLISON MARTIN, *Clinical Associate Professor of Law.* B.S., J.D., University of Illinois.

DEBORAH MCGREGOR, *Clinical Professor of Law and Assistant Director of Legal Analysis, Research and Communication.* B.A., University of Evansville; J.D., Georgetown University Law School.

SUSANAH M. MEAD, *Professor of Law.* B.A., Smith College; J.D., Indiana University School of Law—Indianapolis.

EMILY MORRIS, *Associate Professor of Law and Dean's Fellow.* A.B., Harvard University, J.D., University of Michigan Law School.

NOVELLA NEDEFF, *Clinical Associate Professor of Law.* B.A., J.D., Indiana University.

DAVID ORENTLICHER, *Samuel R. Rosen Professor of Law and Co-Director of the William S. and Christine S. Hall Center for Law and Health.* A.B., Brandeis University; J.D., M.D., Harvard College.

JOANNE ORR, *Clinical Professor of Law.* B.S., Indiana State University; J.D., California Western School of Law.

ANTONY PAGE, *Associate Professor of Law and Dean's Fellow.* B. Comm., McGill University; M.B.A., Simon Fraser University; J.D., Stanford Law School.

H. KATHLEEN PATCHEL, *Associate Professor of Law.* A.B., Huntington College; J.D., University of North Carolina Law School; LL.M., Yale Law School.

MICHAEL J. PITTS, *Associate Professor of Law; Dean's Fellow and John S. Grimes Fellow.* B.S.J., Northwestern University; J.D., Georgetown University Law Center.

PETER A. PRESCOTT, *Associate Professor of Law.* B.A., Augustana College; M.S., The University of Chicago; M.P.A., The University of Texas at Austin; J.D., The University of Houston Law Center.

FRAN QUIGLEY, *Visiting Professor.* B.A., Hanover College; M.A., Indiana University; J.D., Indiana University School of Law—Indianapolis.

FLORENCE WAGMAN ROISMAN, *William F. Harvey Professor of Law.* B.A., University of Connecticut; LL.B., Harvard Law School.

GARY R. ROBERTS, *Dean and Gerald L. Bepko Professor of Law.* B.A., Bradley University; J.D., Stanford University.

JOAN M. RUHTENBERG, *Professor of Law and Director of Legal Analysis, Research and Communication.* B.A., Mississippi University for Women; J.D., Indiana University School of Law—Indianapolis.

JOEL M. SCHUMM, *Clinical Professor of Law* and Director, Judicial Externship Program. B.A., Ohio Wesleyan University; M.A., University of Cincinnati; J.D., Indiana University School of Law—Indianapolis.

FRANCES WATSON, *Clinical Professor of Law.* B.S., Ball State University; J.D., Indiana University School of Law—Indianapolis.

LLOYD T. WILSON, JR., *Professor of Law and Co-Director, Chinese Law Summer Program.* B.A., Wabash College; M.A., Duke University; J.D., Indiana University School of Law—Bloomington.

MARY T. WOLF, *Clinical Professor of Law and Director of Clinical Programs and Externships.* B.A., Saint Xavier College; J.D., University of Iowa College of Law.

R. GEORGE WRIGHT, *Lawrence A. Jegen III Professor of Law.* A.B., University of Virginia; Ph.D., Indiana University; J.D., Indiana University School of Law—Indianapolis.

Emeriti Faculty

THOMAS B. ALLINGTON, *Professor of Law Emeritus.* B.S., J.D., University of Nebraska; LL.M., New York University School of Law.

EDWARD P. ARCHER, *Professor of Law Emeritus.* B.M.E., Renesselaer Polytechnic Institute; J.D., LL.M., Georgetown University Law School.

JAMES F. BAILEY, III, *Professor of Law Emeritus and Director of the Law Library Emeritus.* A.B., J.D., M.A.L.S., The University of Michigan.

CLYDE HARRISON CROCKETT, *Professor of Law Emeritus.* A.B., J.D., University of Texas; LL.M., University of London (The London School of Economics and Political Science).

DEBRA A. FALENDER, *Professor of Law Emerita.* A.B., Mount Holyoke College; J.D., Indiana University School of Law—Indianapolis.

DAVID A. FUNK, *Professor of Law Emeritus.* A.B., College of Wooster; J.D., Case Western Reserve University School of Law; M.A., The Ohio State University; LL.M., Case Western Reserve University; LL.M., Columbia Law School.

PAUL J. GALANTI, *Professor of Law Emeritus.* A.B., Bowdoin College; J.D., University of Chicago Law School.

HELEN P. GARFIELD, *Professor of Law Emerita.* B.S.J., Northwestern University; J.D., University of Colorado School of Law.

HAROLD GREENBERG, *Professor of Law Emeritus.* A.B., Temple University; J.D., University of Pennsylvania Law School.

JEFFREY W. GROVE, *Professor of Law Emeritus.* A.B., Juniata College; J.D., George Washington University Law School.

WILLIAM F. HARVEY, *Carl M. Gray Professor of Law & Advocacy Emeritus.* A.B., University of Missouri; J.D., LL.M., Georgetown University Law School.

W. WILLIAM HODES, *Professor of Law Emeritus,* A.B., Harvard College; J.D., Rutgers University School of Law—Newark.

HENRY C. KARLSON, *Professor of Law Emeritus.* A.B., J.D., LL.M., University of Illinois College of Law.

WILLIAM ANDREW KERR, *Professor of Law Emeritus.* A.B., West University; B.S., Duke University; J.D., LL.M., Harvard Law School.

WILLIAM E. MARSH, *Professor of Law Emeritus.* B.S., J.D., University of Nebraska.

RONALD W. POLSTON, *Professor of Law Emeritus.* B.S., Eastern Illinois University; LL.B., University of Illinois College of Law.

KENNETH M. STROUD, *Professor of Law Emeritus.* A.B., J.D., Indiana University—Bloomington.

JAMES W. TORKE, *Carl M. Gray Professor of Law Emeritus.* B.S., J.D., University of Wisconsin.

JAMES PATRICK WHITE, *Professor of Law Emeritus.* A.B., University of Iowa; J.D., LL.M., George Washington University Law School.

LAWRENCE P. WILKINS, *William R. Neale Professor of Law Emeritus.* B.A., The Ohio State University; J.D., Capitol University Law School; LL.M., University of Texas School of Law.

Law Library Faculty

JUDITH FORD ANSPACH, *Professor of Law and Director, Ruth Lilly Law Library.* B.S., M.L.S., Kent State University; J.D., Mississippi College School of Law.

SUSAN BOLAND, *Head of Information Services.* B.A., Monmouth College; M.S., University of Illinois; J.D., Illinois University College of Law.

DEBRA DENSLAW, *Reference Librarian.* B.A., Franklin College; M.S., University of Illinois, Urbana-Champaign; J.D., Valparaiso School of Law.

RICHARD HUMPHREY, *Reference Librarian.* A.A., Brewton-Parker Junior College; B.A., Georgia Southwestern College; M.L.S., University of Kentucky.

WENDELL E. JOHNTING, *Assistant Director for Technical Services.* A.B., Taylor University; M.L.S., Indiana University.

CHRIS E. LONG, *Cataloging Librarian.* B.A., Indiana University; M.A., Indiana University; M.L.S., Indiana University.

STEVEN R. MILLER, *Reference Librarian.* B.S., Lebanon Valley College of Pennsylvania; M.A., Dominican University; M.S., Northwestern University; J.D., The John Marshall Law School.

MAHNAZ K. MOSHFEGH, *Serials/Acquisitions Librarian.* B.A., National University of Iran; M.S., Tehran University; M.A., Ball State University; M.L.S., Ph.D., Indiana University.

MIRIAM A. MURPHY, *Associate Director.* B.A., Purdue University; J.D., M.L.S., Indiana University—Bloomington.

KIYOSHI OTSU, *Automated Services and Media Librarian.* A.A., Parkland College; A.B., M.S., C.A.S., University of Illinois.

Indiana Law Review

Volume 43 **2010** **Number 4**

TABLE OF CONTENTS

SYMPOSIUM

NOTES

Indiana Law Review

Volume 43 **2010** **Number 4**

SYMPOSIUM

PREFACE

This symposium volume of the INDIANA LAW REVIEW celebrates and memorializes the presentations made at the 2010 annual meeting of the Association of American Law Schools (AALS) in New Orleans. At that meeting, the Section on Real Estate Transactions and the Section on Property Law jointly sponsored a program entitled *Law as Transformative Agent: Thinking and Doing Law in New Categories*. Four speakers from that program contribute the fruits of their scholarly inquiry to this volume: Steven J. Eagle, George Mason University School of Law; Robin Paul Malloy, Syracuse University College of Law; Rigel C. Oliveri, University of Missouri School of Law; and Aleatra P. Williams, Charleston School of Law. In addition, Carol N. Brown of the University of North Carolina School of Law, who served as Chair of the AALS Section on Property Law, contributes a paper, as do I as Chair of the AALS Section on Real Estate Transactions.

As I explain more fully in my paper, the topic for the joint program follows from the theme—Transformative Law—that AALS President Rachel Moran chose for her term of office. Broadly stated, our program's goal was to identify ways real estate transaction law and property law can serve as agents of transformation. The papers in this volume approach that goal from diverse perspectives and employ a range of approaches, including conceptual, comparative, and reform analyses. We hope you find the articles in this volume to be intellectually stimulating.

There are several people who deserve public recognition for making this symposium volume possible. First and foremost, thanks go to the contributing authors for supporting the Section on Real Estate Transactions and the Section on Property Law and for sharing their insights in this volume. I also want to thank the officers, especially current Chair Wilson Freyermuth, and members of the executive board of the Section on Real Estate Transactions for their assistance with planning our program and for all of their other contributions during my year as Chair. Special thanks also go to Professor Brown, who as Chair of the Section on Property Law was an able and amiable partner.

This volume would not have been possible without the enthusiastic support of the Indiana University School of Law—Indianapolis. Dean Gary R. Roberts and the law review faculty advisors, Professors Andrew R. Klein and R. George Wright, supported the publication of a symposium volume from the outset. The staff of the INDIANA LAW REVIEW embraced the idea—including the extra labor that came with the project—and brought the volume to publication with diligence

and care. While many hands were involved, I want to recognize three persons for enduring all the things authors cause editors to endure—Editor-in-Chief Daniel E. Pulliam, Symposium Editor Ann Harris Smith, and Law Review Specialist Christina K. Paynter.

Lloyd T. Wilson, Jr.
Indiana University School of Law—Indianapolis
August 2010

FOLLOWING TRANSFORMATION'S THREAD: REFLECTIONS ON THE CITIZEN-LAWYER AS TRANSFORMATIVE AGENT

LLOYD T. WILSON, JR.*

INTRODUCTION

In 2009, Association of American Law Schools (AALS) President Rachel Moran selected "Transformative Law" as the theme for her year in office. That theme defined three Presidential Programs[1] conducted at the annual meeting in New Orleans and influenced the content of many section programs, including the section proceedings this symposium volume reflects.[2] President Moran developed her theme in a Presidential Address and in three President's Messages that she authored throughout the year. In her Address, Professor Moran conveyed her vision of transformative law and identified the citizen lawyer as its architect.[3] In the subsequent Messages, she explored three domains within the legal academy in which transformative law can be expressed—experiential learning,[4] scholarship,[5] and classroom teaching.[6]

The principal goal of this Essay is to take up Professor Moran's concepts of

---

* Professor of Law, Indiana University School of Law—Indianapolis. B.A., 1977, Wabash College; M.A., 1978, Duke University; J.D., 1982, Indiana University Maurer School of Law; M.T.S., 2010, Christian Theological Seminary.

1. The Presidential Programs were entitled "Transformative Scholarship," "Transformative Teaching and Institution-Building," and "Transformative Advocacy." Information about the topics, speakers, and goals of each Program can be found in many places in the AALS archives, including August 2009 AALS Newsletter, AALSNEWS (Association of American Law Schools, Washington, D.C.), Aug. 2009, at 8, *available at* http://www.aals.org/documents/newsletter/august2009.pdf.

2. At the 2010 annual meeting, the Section on Real Estate Transactions and the Section on Property Law took up Professor Moran's theme in a co-sponsored program entitled "Law as Transformative Agent: Thinking and Doing Property in New Categories." Program speakers and their topics are detailed in the *Introduction* to this symposium volume. I had the privileged of chairing the Section on Real Estate Transactions from early 2009 through the 2010 meeting.

3. Rachel Moran, *The President's Message*, AALSNEWS (Association of American Law Schools, Washington, D.C.), Mar. 2009, at 1-2, *available at* http://www.aals.org/documents/newsletter/march2009newsletter.pdf [hereinafter Moran, *The President's Message*].

4. Rachel Moran, *Transformation and Training in the Law: Serving Clinical Legal Education's Two Masters*, AALSNEWS (Association of American Law Schools, Washington, D.C.), May 2009, at 1, *available at* http://www.aals.org/documents/newsletter/april2009newsletter.pdf.

5. Rachel Moran, *Transformative Scholarship: Legal Academic Knowledge for What?*, AALSNEWS (Association of American Law Schools, Washington, D.C.), Aug. 2009, at 1, *available at* http://www.aals.org/documents/newsletter/august2009.pdf [hereinafter Moran, *Transformative Scholarship*].

6. Rachel Moran, *Transformative Teaching: From the Classroom to the Culture*, AALSNEWS (Association of American Law Schools, Washington, D.C.), Nov. 2009, *available at* http://www.aals.org/documents/newsletter/novembernewsletter09.pdf [hereinafter Moran, *Transformative Teaching*].

transformative law and citizen-lawyer and follow the thread that leads out from them.[7] The point of departure for this Essay is the premise that "transformative law" is not self-actualizing; instead, transformation is a process accomplished via an agency. This is the reason that, in addition to identifying *what* transformative law is (law that fulfills social monitoring and reformation functions), Professor Moran also identifies *who* fills the agency role (the citizen-lawyer). Furthermore, Professor Moran explains *why* law professors should participate in transformative law (preserve cherished civic values) and nurture citizen-lawyers (promote moral agency).

Those are laudable accomplishments, especially given the brevity imposed by the media of address and newsletter. Still, two topics prompt further elaboration. The first is *how* does the desired transformation occur; what is the process by which "people who happen to be lawyers" become citizen-lawyers and agents for transformative law? The second topic is *how* might transformation affect the way we identify and respond to legal issues and the way we teach. Following those threads is the task of the four Parts of this Essay.

I propose in Part I that, although the intended object of transformative law may be the reformation of civic and legal structures, the process of social transformation involves and depends on a preceding transformation of personal ethic. Stated less formally, the *how* of citizen-lawyer formation involves a transformation of the way one defines those acts that are appropriately taken in the world. Furthermore, the transformation of ethic involves a transformation of epistemology. Again stated less formally, the *how* of citizen-lawyer formation involves a transformation in the way one acquires knowledge about the world and orients oneself to it. This two-stage transformation is necessary because an ethic that promotes "the common good," which Professor Moran invokes as a guiding principle of transformative law, requires a relational understanding of the world. An epistemology based on individualism will not support the same ethic as one that acknowledges social and historical connectedness.

In Part II, I first propose that the ethical and epistemological grounding characteristic of the citizen-lawyer significantly impacts the way we understand social issues and seek reform, which is to say our process of inquiry. Specifically, the locus of investigation and ideas for reform may be found to lie much more with non-lawyers—including the poor, uneducated, and marginalized persons in our society—than many are accustomed to believe. To the extent this is true, the process of detached analysis and therapeutic-model response will, at a minimum, come to be complemented by an experientially informed analysis and an accompaniment-model response.[8] Subsequently, I consider the impact

---

7. Additional goals include lending support for Professor Moran's vision and providing sources that like-minded persons might find useful or that skeptics might choose to consult. Professor Moran's ideas obviously stand on their own; I am responsible for all extrapolations.

8. The terms "therapeutic model" and "accompaniment model" come from the field of urban revitalization and are often used to differentiate social services and economic development initiatives from community organizing and community development. The former two approaches are called therapeutic because they frequently involve a professional-client relationship and reflect

that a relational understanding of the world can have on the way we promote—or hinder—our students' moral agency

In Part III, I introduce the ideas that civic participation has the potential to awaken a sense of shared responsibility for social ills and to promote reconciliation. The Essay concludes in Part IV by linking civic participation to social progress and to democratic governance.

Following Professor Moran's endorsement of "insights from cognate disciplines,"[9] the reflections in this Essay draw from authors in the fields of sociology, theology, and community organizing. Despite the cited authors' widely varying perspectives, their writings are mutually reinforcing and have explanatory power.[10]

I. CIVIC PARTICIPATION: A FIRST PRINCIPLE OF TRANSFORMATIVE LAW

A. The Transformation Process: Recovering a Social Ethic

At the heart of Professor Moran's vision of the citizen-lawyer is participation in civic affairs, which means active engagement in matters that focus on the common good. The contemporary professional ethos she seeks to displace is one where individual concerns dominate and where lawyers become "passive tools" and "mere captives of [their] clients' interests."[11] The ethos she seeks to resurrect is one in which citizen-lawyers "take responsibility for the integrity of our society's legal framework"[12] and understand that their professional role includes "building the nation."[13] In a prior era, she asserts, such citizen-lawyers conducted "campaigns for change" in which the law "became a powerful tool to challenge and reconfigure social institutions."[14] In short, active participation in civic affairs was once the means by which transformative law was realized, and it needs to serve that function again.

If the ethos of civic participation is in danger of being lost, understanding the cause may both help us reverse the trend and appreciate what it is about participation that makes it transformative. Alexis de Tocqueville noted that an important part of the American civic and personal character in the nineteenth century was our ancestors' propensity to "constantly form associations."[15] He

---

an orientation in which solutions are developed outside of the community and transported into it. The latter two approaches are called accompaniment because they seek a partnering relationship in which neighborhood resources are built up and directed outward at the causes of social ills.

9. Moran, *Transformative Scholarship*, *supra* note 5, at 2.

10. One need not agree with the political or theological views of any of the cited authors to acknowledge the validity of his or her sociological conclusions.

11. Moran, *Transformative Teaching*, *supra* note 6, at 1.

12. *Id.*

13. Moran, *The President's Message*, *supra* note 3, at 10.

14. *Id.*

15. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 106 (Alfred A. Knopf, Inc. 1972) (1835, 1840).

observed that "Americans of all ages, all conditions, and all dispositions" formed "not only commercial and manufacturing [associations]" but also "associations of a thousand other kinds, religious, moral, serious, futile, general or restrictive, enormous or diminutive."[16] He concluded that participation in civic associations had the benefit of "unit[ing] into one channel the efforts of divergent minds and urg[ing] them vigorously towards the one end to which it clearly points out."[17] Tocqueville so admired nineteenth century Americans' participation in associations that he claimed "[t]here is no end which the human will despairs of attaining through the combined power of individuals united into a society."[18]

Assuming the truth of these observations, the question becomes what happened to that propensity to participate. One explanation points to the emergence of our bureaucratic society. Sociologists describe a shared experience of many Americans in which decisions that most directly affect their lives are controlled by impersonal organizations and by invisible or unapproachable people. Tocqueville, ever aware of threats to liberty, concluded that civic participation "limit[s] the despotic proclivities of government."[19] Given the breadth of the regulatory and bureaucratic network that dominates life in contemporary America, this proclivity may now be most potently expressed in "tendency toward administrative despotism."[20] Such feelings of powerlessness take a heavy the toll on civic participation.

A second explanation offered for the decline in civic participation is the ascendency of a culture of individualism. Although individualism is a multi-faceted topic with multiple sources and expressions, one way to understand it is as a response to "the scale and complexity of modern society."[21] Robert Bellah and his colleagues note that individualism "disposes each citizen to isolate himself from the mass of his fellows and withdraw into the circle of family and friends; with this little society formed to his taste, he gladly leaves the greater society to look after itself."[22] As a result, "the associational life of the modern metropolis does not generate the kinds of second languages of social responsibility and practices of commitment to the public good"[23] that Tocqueville found in such abundance.

One response offered to counteract the sense of powerlessness produced by

---

16. *Id.*

17. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 192 (Alfred A. Knopf, Inc. 1972) (1835, 1840).

18. *Id.*

19. ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 212 (1996) [hereinafter BELLAH ET AL., HABITS OF THE HEART].

20. *Id.*

21. ROBERT N. BELLAH ET AL., THE GOOD SOCIETY 135 (1992) [hereinafter BELLAH ET AL., THE GOOD SOCIETY].

22. BELLAH ET AL., HABITS OF THE HEART, *supra* note 19, at 37 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 506 (George Lawrence trans., J.P. Mayer ed. 1969) (1835, 1840)).

23. *Id.* at 177.

dominating and unapproachable social structures is to promote the formation of mediating structures. Mediating structures are "those institutions standing between the individual . . . and the large institutions of public life."[24] These structures reinsert a human scale to social life and return some degree of control to individuals. In addition, because mediating structures must be populated with participating citizens, they implicate a second response to social passivity—subsidiarity. According to the principle of subsidiarity, "power should devolve on the lowest, most local level at which decisions can reasonably be made"[25] and be made by those persons who are most directly affected.

It is in this re-assumption of responsibility and this re-assertion of power through civic involvement that the process personal transformation begins. People who participate in civic endeavors necessarily assume responsibility for social issues. According to Bellah, "involvement in public affairs is the best antidote to the pernicious effects of individualistic isolation: 'Citizens who are bound to take part in public affairs must turn from the private interests and occasionally take a look at something other than themselves.'"[26] These "habits and practices" of democratic participation "educate the citizen to a larger view than his purely private world would allow."[27]

Even if "[i]t was, in the first place, individual self-interest that led residents . . . to get involved"—sometimes for transparently selfish motives—Bellah observes that "the experience of local self-government transformed them [and] gave them an understanding of public responsibility that transcended individual interest."[28] Tocqueville drew a similar conclusion about civic participation in the form of jury service when he wrote that "[b]y obligating [people] to turn their attention to other affairs than their own, [jury service] rubs off that private selfishness which is the rust of society."[29] Civic participation thus leads to a redefinition of the actions one deems appropriate in the world.

The process of transformation can be explained in large part, but not completely, by the displacement of an individualistic ethic in favor of a broader social ethic. There remains an additional and important feature—civic participation is self-reinforcing. Based on field interviews of Americans who had become involved in civic organizations in one form or another, Bellah concludes that "[t]hrough active involvement in common concerns," citizens become

---

24. William H. Droel, *Foreword to* GREGORY F. AUGUSTINE PIERCE, ACTIVISM THAT MAKES SENSE: CONGREGATIONS AND COMMUNITY ORGANIZATION 1(1984).

25. BELLAH ET AL., THE GOOD SOCIETY, *supra* note 21, at 135. Subsidiarity does recognize a role for larger public institutions, with "the function of the larger unit being to support and assist the local body in carrying out its tasks." *Id.* Specifically, subsidiarity includes the obligation of "higher-level associations such as the state . . . to help when the lower-level associations lack resources to do the job alone." *Id.* at 262.

26. BELLAH ET AL., HABITS OF THE HEART, *supra* note 19, at 38 (quoting DE TOCQUEVILLE, *supra* note 22, at 508).

27. *Id.*

28. *Id.* at 168.

29. 1 DE TOCQUEVILLE, *supra* note 17, at 285.

engaged in "forums in which opinion can be publically and intelligently shaped and *the subtle habits of public initiative and responsibility learned and passed on.*"[30] Furthermore, "the experience of getting involved in local voluntary civic associations *is itself directly capable of generating a sense of responsibility for the public good.*"[31] This finding is good news for the recovery and preservation of the "second-languages of social responsibility and practices of commitment to the public good"[32] that are starved by "the associational life of the modern metropolis."

B. The Transformation Process: Uncovering A Social Epistemology

The transformation that results from civic participation goes even deeper than a recovery of a social ethic; a transformation in epistemology also occurs. Parker Palmer lays out the relationship between ethic and epistemology with refreshing clarity. Palmer's definition of epistemology—the "inquiry into the dynamics of knowing"[33]—makes the topic one of interest for all in the legal profession and of special importance to members of the legal academy. Palmer describes the relationship between ethic and epistemology as follows: "The way we interact with the world in knowing it becomes the way we interact with the world as we live in it. . . . To put it in somewhat different terms, our epistemology is quietly transformed into our ethic."[34] Said more fully:

> [T]he patterns of epistemology can help us decipher the patterns of our lives. Its images of the knower, the known, and their relationship are formative in the way an educated person not only thinks but acts. The shape of our knowledge becomes the shape of our living; the relation of the knower to the known becomes the relation of the living self to the larger world.[35]

The converse is, I submit, also true. Our ethic, once stretched by civic participation can quietly transform our epistemology.

According to Bellah, "'[individualists] form the habit of thinking of themselves in isolation and imagine that their whole destiny is in their hands.' Finally, such people come to 'forget [not only] their ancestors,' but also their descendants, as well as isolating themselves from their contemporaries."[36] Based on an atomized view of the world, individualists do not consider themselves "a part of a larger social and historical whole."[37] However, the transformation in

---

30. BELLAH ET AL., HABITS OF THE HEART, *supra* note 19, at 38 (emphasis added).

31. *Id.* at 168 (emphasis added).

32. *See supra* note 23.

33. PARKER J. PALMER, TO KNOW AS WE ARE KNOWN: A SPIRITUALITY OF EDUCATION 21 (1983).

34. *Id.*

35. *Id.*

36. BELLAH ET AL., HABITS OF THE HEART, *supra* note 19, at 37.

37. *Id.* at 194.

ethic that accompanies one's civic participation effects a corresponding transformation in the way one views the world and knows truths about the world. Atomization gives way to interconnectedness, as we come to see ourselves as impacted by—and impacting—others. Further, this process involves our associations. Just as "in our [interpersonal] life with other people we are engaged continuously . . . in creating and re-creating the institutions that make life possible,"[38] so too is our relationship with associations mutually creative as "while we in concert with others create institutions, they also create us."[39]

The ramifications of this transformation are sweeping, for when we come to know the world as an interconnected whole we come to see ourselves as *a part of* society rather than *apart from* it. Furthermore, when we come to know the world as temporally connected we must then acknowledge our dependence on the decisions made by those who came before us as well as the stewardship responsibility we have for those who will come after us. Professor Moran points to this epistemology of social interconnectedness when she asserts that a true legal professional "puts disputes in context by acknowledging the multiple interests at stake" and "takes the long view in advising clients."[40]

This two-stage development—where an ethic of social awareness formed in civic participation in turn forms an epistemology of connectedness—explains much about the formation of citizen-lawyers.

II. CIVIC PARTICIPATION: INSIGHTS FOR INQUIRY & TEACHING

A. Relational-Based Inquiry

Even though the ethical and epistemological shifts that result from civic participation are important for all legal professionals, the implications are especially important to legal scholars, for whom "knowing" is a defining characteristic and endeavor. It is perhaps worth noting at the outset that the intent of this section is not to claim exclusive validity for one form of inquiry or one form of knowing. The intent, however, is to call attention to the advantages of "relational knowing," to assert its validity, and to encourage its use. This discussion begins with Palmer's idea that the "images of the knower, the known, *and their relationship* are formative in the way an educated person not only thinks but acts."[41] The key to this important phrase lies in the word "relationship." How do, or should, the knower and the known relate to each other?

For Palmer, the error in contemporary scholarship is the "estrangement and alienation"[42] of the knower and the known, which he labels "objectivism."[43]

---

38. BELLAH ET AL., THE GOOD SOCIETY, *supra* note 21, at 11.
39. *Id.* at 12.
40. Moran, *The President's Message*, *supra* note 3, at 12.
41. PALMER, *supra* note 33, at 21 (emphasis added).
42. *Id.* at 26.
43. *Id.* at 25-32. Palmer treats objectivism as the defining characteristic of "modern

Objectivist knowing, he contends, involves holding a subject at a distance and taking a proprietary approach to facts, considering them things to be constructed under the knower's direction and in furtherance of the knower's goals. In contrast with the objectivism's "sharp distinction between the knower and the objects to be known,"[44] Palmer posits an understanding of knowing based on a mutually informing and mutually impacting relationship between them. He writes, "Truth requires the knower to become interdependent with the known. Both . . . have their own integrity and otherness, and one . . . cannot be collapsed into the other. . . . [T]ruth demands acknowledgment of and response to the fact that the knower and the known are implicated in each other's lives."[45]

A sense of the relationship of knower and known can be detected, I believe, in Professor Moran's description of "transformative scholarship," which she says is "neither arcane nor disinterested" and "engages real-world problems in ways that those charged with solving such problems can understand."[46] In one sense, Professor Moran's statements could be taken to mean merely that transformative scholarship should be capable of effecting reforms that positively impact real lives in the real world. But her reference to the idealization in the academy of research undertaken from a "studied distance"[47] reveals that transformative scholarship reaches to the process of scholarly inquiry itself. This idea can be explained in the literature of urban revitalization. There one finds support for the conclusion that distancing the knower from known results in knowledge that is incomplete and possibly even harmful.

Tony Campolo, a sociologist who also works to revitalize deteriorating urban areas, concludes from his work in the field that "only those who live in [poor] communities day in and day out are capable of providing the *kind of analysis* that tells what is really going on, why it is happening, who is responsible, and what can be done about it."[48] Community organizing pioneer, Saul Alinsky, drew the

---

knowing." In his sketch of objectivism, Palmer acknowledges that "[t]here is much about modern knowing we must honor," especially its "capacity to turn upon itself and open itself to correction." *Id.* at 26. An interesting component of Palmer's exposition of objectivism's shortcomings is his analysis of the linguistic roots of the words "fact," "theory," "objective," and "reality." *See id.* at 21-25. Given the insights of post-modern thought, Palmer also acknowledges that his sketch of objectivism could be attacked as caricature. He rebuts this charge by asserting that even though "the separation of knower and the known is no longer convincing" as a matter of science or philosophy, in higher education "that separation is *institutionalized* in our habits of thought, our ideals, and our organization of life." *Id.* at 29 (quoting RICHARD GELWICK, THE WAY OF DISCOVERY 77-78 (1977)).

44. *Id.* at 27.

45. *Id.* at 32. Palmer sometimes uses language that seems to identify relational knowing with situations where the known is a human subject. As the phrase "person or thing to be known" indicates (found above in the text that between notes 41 and 42, the "known" includes inanimate subjects as well as animate.

46. Moran, *Transformative Scholarship*, *supra* note 5, at 2.

47. *Id.* at 17.

48. TONY CAMPOLO, REVOLUTION AND RENEWAL: HOW CHURCHES ARE SAVING OUR CITIES

same conclusion: "In the last analysis of our democratic faith, *the answer to all issues* facing us will be found in the masses of the people themselves, and *nowhere else*."[49] Similarly, community developer John M. Perkins has observed that "[t]he most creative long-term solutions to the problems of the poor are coming from grassroots . . . efforts."[50] Robert Linthicum, former director of World Vision's Urban Advance, states the foundation of these conclusions: "[A]ll human beings, however uneducated, exploited, or beaten down by life, have a greater capacity to understand and act upon their situation than the most highly informed or sympathetic outsider."[51] Obviously, if both analysis and answers are found in others, the process of knowing cannot proceed from a "studied distance." Instead, the knower and the known must enter into a mutually informing relationship. Linthicum describes the process by which knowledge results as the "action-reflection cycle." In the "dynamic of action and reflection," Linthicum says, "[e]ach action will lead to a reflection that is more profound than [prior thoughts] . . . and [e]ach reflection will lead into an action that is more substantive than the one before it."[52]

For community organizers and community developers, the primary goal of the action-reflection cycle is neighborhood empowerment. Empowerment begins with getting people to think about the issues that impact their lives. Alinsky noted that "[t]he issue . . . is simply that if people don't have the power to change a bad situation, they do not think about it."[53] But when they "are organized so that they have the power to make changes, then, when confronted with questions of change, they begin to think and ask questions about how to make changes."[54]

Pierce uses the term "conscientization" to describe this process, which he says involves "enlighten[ing] [people] about the locus of power in their communities and [about] issues"[55] and then using the insights of that enlightenment to guide civic engagement. Pierce contends that the conscientization process is self-expanding, because once an association of citizens "gets into action, there is nothing that must stop it from seeing its interest in larger and larger arenas and from seeing the connection between issues on a local level and those on a national or even international scale."[56] From the

---

107-08 (2000).

49. SAUL D. ALINSKY, REVEILLE FOR RADICALS 40 (Random House Vintage Books 1989) (1946) (first emphasis supplied).

50. RESTORING AT-RISK COMMUNITIES: DOING IT TOGETHER AND DOING IT RIGHT 17 (John M. Perkins ed., 1995) [hereinafter RESTORING AT-RISK COMMUNITIES].

51. ROBERT C. LINTHICUM, BUILDING A PEOPLE OF POWER: EQUIPPING CHURCHES TO TRANSFORM THEIR COMMUNITIES 125 (2005).

52. *Id.* at 201.

53. SAUL D. ALINSKY, RULES FOR RADICALS: A PRAGMATIC PRIMER FOR REALISTIC RADICALS (Random House Vintage Books 1989) (1971) (emphasis excluded).

54. *Id.*

55. PIERCE, *supra* note 24, at 30 (quoting JOHN COLEMAN, AN AMERICAN STRATEGIC THEOLOGY 269-70 (1982)).

56. *Id.* at 30-31. I think "can stop" is the intended meaning of "must stop."

action-reflection cycle and intentional conscientization, "a cycle of learning will develop that progressively deepens the people's empowerment."[57] People who are usually thought to be powerless are transformed as they come to understand the world in a new way and to act in it in a new way.

The point not to be missed, however, is that there is a double transformation at work here. If knowing, as Palmer asserts, implicates the knower in the known, then an experience that changes the known must also change the knower. In community organizing and development, it is not just the neighborhood resident (the known) who engages in the action-reflection cycle; the organizer or developer (the knower) also participates. Although residents begin by reflecting on conditions in their neighborhood and then proceed to action, the organizer or developer enters the cycle in the action of engaging the residents and their neighborhood. The cyclical progression is the same regardless of starting point. This progressive process of knowing has the potential to provide researchers with an analysis that is more complete and more insightful than could be obtained from a studied distance.

In terms of the civic reform, there is one further advantage of relational knowing—changes in the knower and the known cause both to change the organizations and structures they encounter. Linthicum puts it succinctly: "As we act our way into new ways of thinking and think our ways into new ways of acting, we become changed people and change our institutions."[58]

In addition to these positive contributions, relational knowing can also avoid some negative outcomes that can be unintended consequences of detached inquiry. Detached scholarship, what Professor Moran calls disinterested scholarship,[59] can be unwelcomed by those persons we intend to benefit. For example, social service and economic development initiatives that fail to take into account the experiences and ideas of local residents have been called "neighborhood unfriendly" and even "a form of injustice."[60] Obviously, no scholar would want to have such caustic labels attached to his or her analysis.

B. Relational-Based Teaching

In her essay on transformative teaching, Professor Moran writes of the contributions of diversity, empathy, and compassion to the classroom and to the decision-making process. "Part of the benefit of diversity," she says, "is that it forces confrontation with and understanding of different perspectives and assumptions."[61] She also asserts that empathy and compassion "are critical tools to help decision-makers appreciate how others see the world from distinct

---

57. LINTHICUM, *supra* note 51, at 201.

58. *Id.* at 220.

59. Moran, *Transformative Scholarship*, *supra* note 5, at 2-3.

60. Bob Lupton et al., *Relocation: Living in Community*, *in* RESTORING AT-RISK COMMUNITIES, *supra* note 50, at 82, 84.

61. Moran, *Transformative Teaching*, *supra* note 6, at 3.

perspectives."[62] These points can be expanded and brought within the epistemological focus of this Essay by contrasting Professor Moran's vision of transformative teaching with objectivist teaching.

Palmer notes the irony involved in the survival of objectivism-based teaching in higher education. In the face of the insights from contemporary science and philosophy, which establish that "the sharp Cartesian split between mind and matter, between I and the world, is no longer valid,"[63]

> objectivism is institutionalized in our educational practices, in the way we teach and learn. There, through the power of the "hidden curriculum," objectivism is conveyed to our students; our conventional methods of teaching form students in the objectivist world-view. If you want to understand our controlling conception of knowledge, do not ask for our best epistemological theories. Instead, observe the way we teach and look for the theory of knowledge implicit in those practices. That is the epistemology our students learn—no matter what our best contemporary theorists say.[64]

The problem posed by "conventional methods of teaching," which put a premium on professional control and status and which can be used as a medium for "self-indulgent and preening" pedagogy,[65] is that they shape the worldview and actions of our students. Palmer continues:

> The teacher is a mediator between the knower and the known, between the learner and the subject to be learned . . . . The way a teacher plays the mediator role conveys both an epistemology and an ethic to the student, both an approach to knowing and an approach to living. I may teach the rhetoric of freedom, but if I teach it *ex cathedra*, asking my students to rely solely on the authority of "the facts" and demanding that they imitate authority on their papers and exams, I am teaching a slave ethic. I am forming students who know neither how to learn in freedom nor how to live freely, guided by an inner sense of truth.[66]

Such an approach to teaching contradicts the goal of creating students who "remain their own moral agents."[67] As Professor Moran reminds us, cultivating moral agency is central to our role as teachers, "for teaching is the primary means by which we will—or will not—shape the ethos of new generations of practitioners, who may or may not consider themselves 'citizen-lawyers.'"[68]

Although the importance of moral agency may be self-evident, a specific

---

62. *Id.*

63. PALMER, *supra* note 33, at 28 (quoting philosopher Fritjof Capra, *Buddhist Physics*, *in* THE SCHUMACHER LECTURES 132 (Satish Kumar ed., 1980)).

64. *Id.* at 29.

65. Moran, *Transformative Teaching*, *supra* note 6, at 5.

66. PALMER, *supra* note 33, at 29-30.

67. Moran, *Transformative Teaching*, *supra* note 6, at 6.

68. *Id.* at 2.

example connected to civic engagement may be instructive. In a commencement address entitled "The Convenient Reverse Logic of Our Time," John Kenneth Galbraith noted a disturbing characteristic of policy-making in the America: Rather than moving "from diagnosis to remedy" in social policy, we have witnessed with greater frequency the rise of reverse logic, moving from a preferred remedy to an appropriate diagnosis.[69] In other words,

> we have come to first identify the remedy that is most agreeable, most convenient, most in accord with major pecuniary or political interest, the one that represents our available faculty for action; then we move from the remedy so available or desired back to a cause to which that remedy is relevant.[70]

Galbraith pointed to poverty alleviation policy as a prime example of reverse logic at work. Mark Robert Rank develops this observation at length in his "paradigm shift" analysis of poverty's causes.[71] Rank demonstrates that when we move the focus of poverty analysis from the unit of the individual to the unit of society, previously accepted causes of poverty—primarily individual failings—lose their force. Furthermore, because "solutions are caught up in causes," locating new explanations of poverty in structural forces leads to new structurally focused solutions.

Galbraith's thesis and Rank's study are offered here to make the point that "[t]here is an eternal dispute between those who imagine the world to suit their policy and those who correct their policy to suit the realities of the world."[72] If we fail to employ educational methods that encourage the development and exercise of moral agency, we render our students susceptible to the use of reverse logic by those seeking to protect vested interests.

III. CIVIC PARTICIPATION: PATHWAY TO RESPONSIBILITY & RECONCILIATION

Following transformation's thread has brought us a long distance, but there remains an additional potential that should at least be raised—the role of civic participation in promoting social responsibility and reconciliation. These goals are not specifically identified in Professor Moran's Messages, but they may be extrapolated from her references to empathy as a component of transformative law teaching. Speaking specifically of judicial decision-making, Professor Moran asserts that empathy is an important qualification because people caught up in our legal system seek not only justice but also understanding.[73] One

---

69. JOHN KENNETH GALBRAITH, A VIEW FROM THE STANDS: OF PEOPLE, POLITICS, MILITARY POWER AND THE ARTS 35 (1986). This collection of writings contains the commencement address, which Galbraith delivered in 1984 at American University.

70. *Id.*

71. MARK ROBERT RANK, ONE NATION, UNDERPRIVILEGED: WHY AMERICAN POVERTY AFFECTS US ALL 169-79 (2005).

72. *Id.* at 170. Rank attributes this quote to French historian, Albert Sorel.

73. Moran, *Transformative Teaching*, *supra* note 6, at 4.

example that illustrates her point is a study of proceedings in Chicago's Eviction Court. That study documented a consistent disregard of substantive and procedural protections afforded to tenants;[74] among the many resulting harms, the study's authors included dignitary harm experienced by tenants. The authors assert that when our legal system exhibits equality, impartiality, and transparency, it "not only inspires confidence in those who do not prevail; more importantly, it conveys to the parties that their autonomy and dignity as persons is respected."[75]

Human dignity is also affirmed when we acknowledge our responsibility to others and when we reconcile with them concerning our failures to honor that responsibility. An epistemology and ethic grounded in individualism frustrates both acceptance of responsibility and reconciliation as it promotes insularity from our fellow citizens. As Mark Robert Rank points out, "[o]ne of the unspoken advantages" of individualism is that it "lets us off the hook" for social injustices endured by others.[76] In contrast, civic participation involves us in "communities larger than ourselves" and helps us realize that "we carry a civic responsibility to alleviate serious harms that befall community members."[77]

Our responsibility certainly encompasses acts of individual culpability, but it is larger than that. We have shared responsibility for others, grounded in the concept of "reciprocity," simply by virtue of our membership in society.[78] In isolation, we have little trouble absolving ourselves from individual culpability, and shared responsibility does not even occur to us. On the other hand, as noted earlier, if people get involved in civic issues, "they will begin to see the connections between their situations and that of others."[79] Once we are able to see connections, we can begin to acquire a wider view of causation that binds us socially to others. As an expanded view of causation leads to an expanded view of responsibility, we should also expect an expanded inclination to address the root causes of others' distress.

Participating in civic associations has a further impact, as associations often bring together a wide array of people, which presents an occasion to work within and across social divides.[80] Participation thus involves "barrier-crossing," and

---

74. LAWYERS' COMMITTEE FOR BETTER HOUSING, NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT (Dec. 2003), *available at* http://www.lcbh.org/images/2008/10/Chicago-eviction-study.pdf [hereinafter LAWYERS' COMMITTEE FOR BETTER HOUSING]. This 2004 study was conducted by Chicago-based Lawyers' Committee for Better Housing (LCBH) in conjunction with Chicago-Kent College of Law and is a successor to a 1996 study on the same topic. For a more complete description of the two reports, see Lloyd T. Wilson, Jr., *The Beloved Community: The Influence and Legacy of Personalism in the Quest for Housing and Tenants' Rights*, 40 J. MARSHALL L. REV. 513 (2007).

75. LAWYERS' COMMITTEE FOR BETTER HOUSING, *supra* note 74, at 20.

76. RANK, *supra* note 71, at 19-20.

77. *Id.* at 146.

78. *Id.* at 149.

79. PIERCE, *supra* note 24, at 76.

80. Phil Reed, *Toward a Theology of Christian Community Development*, *in* RESTORING AT-

can help bring down "the most stubborn ethnic and racial [walls], indeed all man-made, barriers."[81] In the best scenario, one product of civic participation with others is the development of respect, trust, and relationships between persons and groups who previously viewed each other with suspicion and antagonism.

IV. CIVIC PARTICIPATION: A CONCLUDING CALL

At the beginning of this Essay, I asserted that transformative law is not self-executing but instead depends on the actions of individual transformative agents. Opposing the call to participation is the "danger of futility," which is the "belief that there is nothing one man or woman can do against the enormous array of the world's ills."[82] Contemporary society and the ethos of individualism can cause us to question whether one person's civic participation will have any meaningful impact. Countering this danger, however, there is the "simple but powerful idea that each of us can make a difference"[83] in the world. Indeed, we are encouraged "[n]ever to doubt that a small group of committed citizens can change the world" for "it is the only thing that ever has."[84]

We should heed the call to civic participation because it is an essential component of democracy. In free and self-governing society, "the real democratic program is a democratically minded people—a healthy, active, participating, interested, self-confident people who, through their participation and interest, become informed, educated, and above all develop a faith in themselves, their fellow [humans], and the future."[85] Such citizens, as agents of personal and civic transformation, "*are* the future."[86] A good start toward realizing that future is found in cultivating citizen-lawyers who fulfill the transformational vocation of our profession.

RISK COMMUNITIES, *supra* note 50, at 27, 33.

81. RESTORING AT-RISK COMMUNITIES, *supra* note 50, at 33.

82. RANK, *supra* note 71, at 243-44 (quoting Robert F. Kennedy's 1966 "Day of Affirmation" address to students and faculty at the University of Cape Town in South Africa).

83. *Id.* at 244.

84. *Id.* at 243 (quoting Margaret Mead from an unspecified source).

85. ALINSKY, *supra* note 49, at 55 (emphasis removed).

86. *Id.* (emphasis supplied).

REAL ESTATE TRANSACTIONS AND ENTREPRENEURSHIP: TRANSFORMING VALUE THROUGH EXCHANGE

ROBIN PAUL MALLOY*

INTRODUCTION

This Essay is offered as an invitation to a conversation about the way in which we think, or might think, about real estate transactions. Preliminary and suggestive in nature, the Essay invites readers to think about an entrepreneurial theory of real estate transactions. Many of these ideas expand on work I began in two earlier books: *Law and Market Economy: Reinterpreting the Values of Law and Economics*[1] and *Law in a Market Context: An Introduction to Market Concepts in Legal Reasoning*.[2] In each of these books, I develop the idea of law and market economy, or what might otherwise be identified as law and market exchange theory. This approach is based on the market as a dynamic process of exchange and involves examining the way in which exchange is initiated, the terms of trade, the subjects of exchange, and a variety of socio-legal factors that govern human interaction in a market society. It is an approach grounded in an understanding of the market as a place of meaning and value transformation rather than one of a simple utilitarian economic calculus. It assumes that the market is a means to a mission-directed end rather than an end in itself. In this Essay, I apply this approach to an initial consideration of real estate transactions to suggest that such transactions are prototypical examples of entrepreneurship because they focus on the transformation, capture, and creation of value through exchange.

At the outset, it is important to understand that the value of a transaction depends on its position and its relationship to all other elements of a given system

---

* E.I. White Chair and Distinguished Professor of Law at Syracuse University College of Law. A shorter version of this Essay will appear in CREATIVITY, LAW AND ENTREPRENEURSHIP (Shubha Ghosh & Robin Paul Malloy eds., Edward Elgar Publishers) (forthcoming late 2010 or early 2011). In this Essay, as in much of my work, one can identify the influence of ideas from Austrian economics and from the philosophy of Charles Sanders Peirce. Peirce, of course, is a founding figure in modern semiotics along with Ferdinand de Saussure. Saussure developed a two-part theory of signs (the sign and the signified) and Peirce pioneered a triadic theory of signs (based on the icon, index, and symbol). Peirce was also a founding figure with William James, John Dewey, and Oliver Wendell Holmes in what became known as the philosophy of American pragmatism and realism. Although there are many books on Peirce and his theory of signs, an interesting read on Peirce and his relationship to James, Dewey, and Holmes can be found in LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA (2001).

1. ROBIN PAUL MALLOY, LAW AND MARKET ECONOMY: REINTERPRETING THE VALUES OF LAW AND ECONOMICS (2000) [hereinafter MALLOY, LAW AND MARKET ECONOMY] (published in English and translated into Chinese and Spanish).

2. ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING (2004) [hereinafter MALLOY, LAW IN A MARKET CONTEXT].

of exchange (a given market context). This means that exchange and the values generated are contextually informed by a variety of factors such as history, ideology, and culture. In such an environment, entrepreneurship involves the ability to successfully interpret the position and relationship of a potential transaction in order to form a plan of action that advances a particular mission-directed outcome. Mission-directed outcomes may themselves reflect a variety of human needs and motives including those related to basic food and shelter; a desire for power, control, status, security, and respect; and a sense of fairness, justice, and equity. It is important to understand that price and wealth are merely partial interpretations of value and not value itself; similarly, economics is an incomplete interpretation of market theory and not the market exchange process itself.

It should also be noted that modern real estate transactions involve the strategic coordination of networks of property-related assets including real, personal, intangible, cultural, and intellectual property. In addition, structuring a real estate transaction (especially a commercial one) requires knowledge of markets and application of other areas of law including corporate, commercial, securities, tax, finance, mortgage, environmental, and land use law. In this context, modern real estate transactions involve two primary activities: (1) the fixing of assets so that they are commodifiable (a process of assetization); and (2) the strategic use of transactional infrastructure to facilitate trade in these assets for purposes of capturing and creating value.

This Essay, therefore, undertakes to address the relationship among property, real estate transactions, and entrepreneurship. The hope is to develop an introductory typology of entrepreneurship and a sense of real estate transactions as a source of transformative change in property law. In furtherance of this goal, the Essay seeks to develop a more nuanced sense of the potential types of entrepreneurs that particular legal incentives may need to account for in promoting exchange in property-based assets. In this regard, the Essay explores several categories or patterns of entrepreneurial behavior that come into play with property transactions. Each pattern of behavior reflects different motivations for participation by people in particular types of transactions. The suggestion is that different people seek different types of returns and value rewards from property transactions and that multiple behavior patterns can nonetheless all be identified as forms of entrepreneurship. Ultimately, the Essay offers some preliminary and tentative thoughts on developing a more nuanced approach to understanding entrepreneurship in the context of the real estate transaction.

With this in mind, the Essay also seeks to define entrepreneurship in the context of real estate transactions. In accomplishing these goals, the Essay proceeds in several steps. Part I outlines key background assumptions regarding the relationship between property law as a subject area and real estate transactions as a related but distinct subject area. Part II discusses the general idea of entrepreneurship and provides a working definition for use in this Essay. Part III suggests four different patterns of entrepreneurial behavior that seem to operate in property transactions. The Essay concludes with some suggested implications for thinking about the development and teaching of real estate

transactions theory.

I. RELATIONSHIP BETWEEN PROPERTY LAW AND REAL ESTATE TRANSACTIONS

In developing an understanding of the relationship among property law, real estate transactions, and entrepreneurship, it is important to understand that this analysis is from the perspective of transactional law theory. The analysis reflects on the function of property in terms of people concerned with real estate transactions. This approach is quite different from the typical theoretical stance taken when discussing property matters. Ordinarily, work in the property area involves a property-centric view of seeing transactions from the perspective of a property lawyer (or academic) preoccupied with typical subject matter concerns of a first year property course. Such a view examines the world in terms of how everything relates to basic theories of property law. In contrast, in developing a theory of real estate transactions, one asks how everything, including property, relates to and facilitates a theory of transactions. The difference involves a shift in the interpretive frame of reference from one that is property-centric to one that decenters property and places the transactional process of human interaction at the core.[3]

---

3. I have found that the idea of decentering the property perspective does not sit well with some property scholars. The reality, however, is that there are many vantage points from which to examine property relationships. It is also important to note that the world has changed and markets have changed. We live in a world in which ideas, creativity, and entrepreneurship increasingly drive strategic gains. It is also a world in which networks and patterns of exchange become increasingly significant while property functions as a foundation on which exchange takes place. It is a world that is less concerned with property as place and more concerned with markets that transcend interjurisdictional space. People often put a great deal of value on property assets for what those assets mean in terms of exchange and access to globalized markets. For example, people do not really want to sit back and bask in the glow of owning a patent and knowing that they can exclude others from ownership; they want the value of being able to transfer and profit from ownership. The real action in property law is in developing a strategic theory of transactions while recognizing the role of the process by which assets become fixed for exchange.

So as not to be misunderstood, none of this means that we do not need property or that property is not important. Most people understand the significance of such property concepts as the rights to use, possess, and exclude, but the real strategic action in today's marketplace centers on the right to transfer and the right to profit from ownership. In terms of strategic value, the exchange has become critical while the process of assetization has become normalized. Of course, one need not accept my view of the rising importance of transactions, relative to the process of fixing assets, to acknowledge the more important point: real estate transactions involve their own scholarly and theoretical issues, and although these issues are related to property, they are distinct and of at least equal significance in understanding the use, function, and purpose of property in the world. Thus, in a course on real estate transactions, property and property theory, about which much has been written, are not at center stage. Rather, property and property theory function more as scenery and stage props for the actual drama that unfolds.

From a transactional perspective, property law is primarily about a process of fixing assets. By this, I mean that property involves the process of identifying and defining particular assets such that they can be traded and exchanged. Property is not an object or a thing; it is the process by which assets are identified, commodified, and fixed for purposes of facilitating trade and exchange. Property is simply a process of fixing assets so that the assets are identifiable and exchangeable in the marketplace. This includes fixing a writing for purposes of copyright law or fixing an invention for purposes of patent law just as much as it includes fixing a legal description and an estate interest for the identification of real property. Thus, although real property and intellectual property may have significantly different qualities, each can be properly understood as property because each involves the fixing of an asset within the basic framework of a property law regime. The idea that certain interests might also be describable in non-property terms does little to diminish the reality that such an interest can also be a legally fixed property asset. Not all property assets need to share exactly the same qualities or characteristics.

Fixing an asset involves identifying, defining, and assigning it certain qualities, characteristics, and categories.[4] The underlying qualities include definitional matters such as fixing a legal description and the particular estate interest for real property. In terms of assigning characteristics to the asset, the typical characteristics of ownership include the right to use and possession, the right to exclude, the right to transfer, and the right to the profits attributed to the asset (including equity appreciation). Finally, property-related assets are categorized in such terms as real, personal, intangible, cultural, and intellectual property. This categorization permits a more nuanced treatment of the asset. Fixing the asset also involves ascribing certain default rules such as remedies to transactions in that asset. Thus, by simply categorizing something as "real property" one can ascribe certain qualities, characteristics, and potential causes of action to the asset. One can then deal more efficiently with the asset by reducing various transaction costs associated with learning about its potential value. Property law and property lawyers focus primarily on the fixing of assets. Consequently, property lawyers concern themselves with the questions of "what is property?" and "what ought to be property?"

In contrast to property lawyers, transactional lawyers focus on the questions of what we can do with something that is defined or treated as property (that is, what we can do with a fixed asset within a recognized property category) and what should be the incentivized priority structure of exchange within a given market context. While property lawyers identify objects of trade and exchange, transactional lawyers manage the risk, authentication, and potential enhancement of value from exchange. Put another way, property lawyers fix assets, and transactional lawyers facilitate the capture and creation of value from exchange in these assets. Thus, for example, real estate transactions involve the strategic

---

4. *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 49-51 (2000); MALLOY, LAW IN A MARKET CONTEXT, *supra* note 2, at 109.

use of legal infrastructure to facilitate the transfer of assets in ways that create and transform value. This practice can result in a change of ownership or an adjustment of certain characteristics of ownership with respect to an asset, or it might result in the integration of a given asset into a bigger real estate project. Similarly, transactions may generate new value opportunities by transforming the underlying asset into a new legal form. This transformation might result from something such as issuing a security supported by the underlying property asset, as in using pools of mortgages to support the issuing of mortgage backed securities.[5] The exchange of assets creates value and transforms relationships, and much of this value is generated by the structure and strategic use of transactional infrastructure rather than the fixing of the underlying asset.

In fact, in our modern global marketplace, assets flow dynamically in fully integrated networks of finance and exchange. In this environment, local notions of place have become less significant, and the ideas of property less *strategically* important than the mechanisms for moving and transacting in various asset values.[6] By this I mean that basic property concepts have become largely globalized, and strategically significant sources of transformative value now arise from advantages in structuring and manipulating the legal infrastructure of exchange rather than from a system for fixing assets. In other words, the scaling of exchange has changed, and as markets scale up from the localized level to regional, national, and global levels, the significance of the network infrastructure becomes strategically more important in adding and sustaining value than the underlying process of fixing assets. This is not to say that there is no longer a need for fixing assets or that property suddenly becomes irrelevant. An analogy might be to the relationship between an individual computer and a computer as a component of a large-scale network. The individual computer is of significant value and can assist its user in accomplishing many tasks. At the same time, the strategic value of the computer rapidly increases with innovations in scaling through the development of network architecture that connects the individual computer to an integrated system, likewise with a cell phone. The cell phone is a basic access tool, which is important, but it is the network that adds strategic advantage and value. Just look at television advertising, the strategic value in phone communications involves network coverage, speed, and supported applications. The phone is primarily an individual access tool, and as the network scales up, it is the network more than the phone that adds real strategic value. In the context of this Essay, property is the access tool and real estate transactions are the networks.

---

5. *See* ROBIN PAUL MALLOY & JAMES CHARLES SMITH, REAL ESTATE TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 367-406 (3d ed. 2007). This material also found in Robin Paul Malloy, *Mortgage Market Reform and the Fallacy of Self-Correcting Markets*, 30 PACE L. REV. 79, 89 (2009) [hereinafter Malloy, *Mortgage Market*].

6. *See generally* Robin Paul Malloy, *Place, Space, and Time in the Sign of Property*, 22 INT. J. SEMIOTICS LAW 265, 265-77 (2009) (addressing the central role of place in property and suggesting some problems with the changing nature of markets that transcend traditional notions of place).

To expand on the above, the idea behind the dynamics of this new global reality is relatively simple.[7] For example, not so long ago (before the proliferation of personal computers), a person or business would gain a significant strategic advantage from having a computer and in-house computer software for word processing.[8] Having such a system would give one a major advantage over a competitor without such a system. Now, however, computers dominate the workplace and everyone can have an efficient word processing system by simply buying Word or WordPerfect. There is no longer any real strategic advantage to be had in this respect. Now it is not so much about having a computer and word processing software because everyone has these basic background tools. Instead, strategy is about trying to identify unique ways to employ and network these assets for purposes of generating new exchange opportunities and values.

In a similar way, consider Buffalo, New York, once one of the wealthiest cities in the United States because of its strategic location near Niagara Falls and its ready access to a cheap and abundant source of power.[9] That strategic geographic advantage has all but disappeared as new technology made it possible to obtain cheap power in places that were physically distant from the source. Now there is no significant advantage in locating a business in Buffalo rather than in any one of a hundred other places. The ability to generate and deliver power has been re-scaled to a higher level, and network infrastructure has strategically shifted value from the place of the source, to the delivery and exchange network. Something similar is happening in the area of property assets. The basic ideas of property, in terms of a process of fixing assets, have been globalized to a significant extent. Therefore, these background concepts and tools, although important, are no longer the primary sources of strategic advantage as they once were. In the highly integrated markets of the twenty-first century, strategic advantage in dealing with property assets more likely lies in the development of new methods of finance, the structuring of favorable tax laws, the integration of credit security systems, the emergence of new forms of risk spreading, and the development of better technologies for quickly recording, storing, and authenticating asset information across globally networked landscapes.

The strategic significance of transactional infrastructure can be seen in the economic development of China. Over the past twenty to thirty years, China has witnessed trillions of dollars of growth in real estate development even though it lacked, until recently, a legal right to property as would be understood in the United States.[10] The transactional infrastructure in China developed to facilitate

---

7. *See generally* NICHOLAS G. CARR, DOES IT MATTER? INFORMATION TECHNOLOGY AND THE CORROSION OF COMPETITIVE ADVANTAGE (2004); Nicholas G. Carr, *IT Doesn't Matter*, 81 HARV. BUS. REV. 41-42 (2003); HOWARD SMITH & PETER FINGAR, IT DOESN'T MATTER: BUSINESS PROCESSES DO (2003) (analyzing Nicholas Carr's IT article in HARV. BUS. REV.).

8. *Cf.* CARR, DOES IT MATTER, *supra* note 7,at 63-66.

9. *See id.* at 20.

10. PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 1-2 (Robin Paul

exchange by "plugging" local markets into a large scale financial infrastructure of investment resources from outside the country and integrating it with locally emerging networks. Network access, strategic use of leasing mechanisms, and the willingness to deal in property-like assets proved sufficient for real estate development without a need for an official legal classification of "property." We can understand this idea of property-like assets when we think of important assets that are valued and exchanged in the United States even if they are not necessarily classified as property per se. Examples of such property-like assets include trademarks, goodwill, licenses, contract rights, and rights in lawsuits.[11] The important point is that assets need to be fixed, and this is a function of property law, although assets need not be fixed as property per se.

Strategically, the world has changed. As we look ahead, we need to think beyond property and traditional approaches to the economics of utilitarian cost-benefit analysis. The future is driven by an increasingly networked and global environment in which entrepreneurship is critically important. In this environment, the transformative advantage goes to the player(s) with the best-developed infrastructure of exchange and the most creative pool of transactional entrepreneurs. Perhaps this is itself the most significant transformation of value in modern property relations—the shift in primacy away from the question of *what is and ought to be property* to the question of *what can and ought to be done with property*. It is a shift away from the strategic significance of fixing assets to that of shaping and controlling the mechanisms of exchange.[12] This shift does not deny the importance of assetization as an underlying activity of property law; it merely puts property law in its proper place as an input activity in the process of transforming and creating value through exchange.

The increased focus on strategic transactional infrastructure as a source of value means that real estate transactions play a significant role in the transformative functions of property. It also means that attention must be paid not only to thinking about a theory of property, but also to developing a coherent and socially situated theory of real estate transactions. Such a theory must account for more than an economic calculus; it must address the idea of property in a market context by exploring a number of socio-legal factors. Furthermore, because the transactional process centers on capturing and creating value from exchange (a core function of entrepreneurship), it is important to develop a nuanced understanding of entrepreneurship as a core component of any theory of real estate transactions.

Malloy ed., 2008). The new property law in China became effective October 1, 2007. *Id.* at 1.

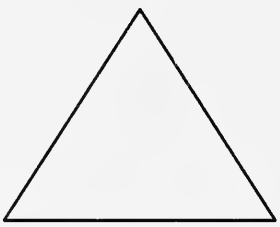
11. Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 HASTINGS CONST. L.Q. 373, 379 (2009) (providing some examples of assets with the ambiguous status as property) (emphasis added).

12. Today's rapidly changing technology and integrated networks of exchange conspire to push the process of asset transformation into new territory, often creating ambiguities along the edges of established property categories (disputes over body parts, genetic information, and carbon trading rights come to mind). This ambiguity can leave property law in the position of trying to play catch-up in terms of defining emerging and evolving forms of asset value.

In an overly simplified form, the relationship between property and transactions can be illustrated triadically as shown in the diagram below.[13] The diagram as a whole represents the way in which real estate transactions function as an entrepreneurial process directed at capturing and creating value from the strategic exchange of fixed assets.[14]

The Real Estate Transactions Process

Exchange (Perspective, Purpose, Planning)



Property (Qualities, Characteristics, Categories)

Value (Use, Exchange, Network)

In the above relationship, there are three key touch points around which to develop a theory of real estate transactions and entrepreneurship: property, exchange, and value. A brief outline of the ideas associated with each of the

---

13. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 1, at 70-72; MALLOY, LAW IN A MARKET CONTEXT, *supra* note 2, at 69-80. In these two books, I explain the underlying theory of a triadic approach, which is informed by the work of American pragmatist Charles Sanders Peirce. Peirce's theory of meaning and understanding (termed semiotics, the study of signs) provides a rich foundation for analyzing complex and dynamic systems such as those of law and markets. My books also detail numerous sources of information about Peirce and his work. Because much of the background theory is explained in these two books, I will not go into detail in this short Essay. I will simply point out the elements in the diagram that follows, and anyone with an interest can go to my earlier books for a better understanding of the relationships. Note that LAW AND MARKET ECONOMY is much more focused on a theory of value and entrepreneurship than is LAW IN A MARKET CONTEXT. One may gain the quickest overview of my use of Peirce's semiotic approach from pages 62-85 of LAW IN A MARKET CONTEXT.

In a Peircean sense, the idea of a real estate transaction can be understood as a sign, and the sign stands for a certain meaning to some people. The sign consists of a first, second, and third element (the icon, index, and symbol, respectively). In the first diagram, property stands as a first, exchange as a second, and value as a third element. There is a continuous and dynamic relationship among the first, second, and third elements that Peirce identified as a process of semiosis. This process gives rise to meanings and values that form and reform over time. The point of this discussion is simply to explain that there is a lot of theoretical work behind the triadic explanations that I present. I believe that one can gain insight from thinking about the ideas being described without any deep knowledge of Peirce. At the same time, for those who have questions about the simplicity of the depictions I offer in this Essay, I acknowledge their simplicity as a starting point for a conversation and offer references to my earlier books as sources for understanding some of the background thinking that I bring to the subject.

14. The next section of the Essay will address the related concept of entrepreneurship.

three key touch points is provided to give a sense of the overall project. First, however, one must keep in mind that the above relationships are not static; they are dynamic and multi-directional relationships that reflect a continuous process of interaction, creativity, and change. Each of the three touch points is discussed below.

A. Property

Property involves a process of fixing assets. This process establishes the basic fundamental qualities of the assets that will be the subject of trade and exchange. It involves setting basic definitions and descriptions as well as the characteristics of ownership and the various subcategories of property types (as discussed above). From a transactional perspective, this is the function of basic property law and theory—to work out the technicalities of what is property and what ought to be property. Theory here consists of elements including a number of constitutional, institutional, political, and economic matters.[15]

B. Exchange

Exchange involves the process of strategically structuring transactions with the hope of capturing and creating value. In general, there are three types of exchanges one might encounter: contract-based exchanges, gifts, and transfers by operation of law (including takings). Real estate transactions focus predominantly on contract-based exchanges and how to strategically structure an exchange to best achieve a mission-directed outcome. Doing this means that one accounts for both the potential for gain from a successfully completed transaction and the protection against loss in the event the transaction fails (perhaps as a result of default, foreclosure, or bankruptcy).

The fixing of assets under property law implicitly, if not expressly, contemplates exchange. The exchange process intrinsically references property law for the basic raw materials of the transaction, with everything ultimately coming together in a process directed at capturing and creating value. From the exchange perspective, the real estate lawyer deals with alternative ways to structure transactions so as to transform, capture, and create value. In order to accomplish this goal, the real estate transactions lawyer must focus on three exchange factors: perspective, purpose, and planning.

1. Transactional Perspective.—In order to create value and assist others in such a process as a lawyer, one must know and appreciate the way in which the activity of exchange is interpreted and understood by the potential parties involved. One must see the transaction from the perspective of the primary parties to the contract as well as from that of the facilitating secondary parties such as attorneys, lenders, regulators, brokers, and other intermediaries.

---

15. Two examples of excellent work in the area of property theory (admittedly, there are more) are GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE (2006) and LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER (2003).

Likewise, the entire transaction should account for third party perspectives. Third parties are those likely to be affected by externalities or parties who may potentially deal in the asset at some future date or in some altered form. Thus, the transactional lawyer must work on the ability to imagine and structure an exchange from multiple points of view. Even if the lawyer is engaged to represent only one particular view, it is critical to account for the motives, objectives, and constraints of the other parties so that negotiation can be successful. In directing learning and knowledge about transactions in this way, one develops alertness to a broader understanding of individualized exchange and increases the likelihood of spotting new opportunities for gain from arbitrage.

2. Transactional Purpose.—In order to successfully structure a transaction, one must understand the mission-directed purpose of the exchange. One must identify the immediate goal (e.g., to get financing or build a house or office building) and the implicit goal of understanding the actors' motivation and mission-based values. The idea of transacting to capture and create value is not reducible to some simple cost-benefit calculus about maximizing profit. Transactional motivations are much more complex based in part on institutional and behavioral issues to be discussed in the next two parts of this Essay. People transact to advance mission-directed objectives and do so by making value choices that account for incentivized market structures, but they are not necessarily driven by a desire to maximize a purely self-interested economic rate of return. Here the transactional lawyer needs a multifaceted theory of value and motivation that transcends the traditional economic tools of cost-benefit analysis and game theory. The transactional lawyer must do more than calculate; she must develop an understanding of the meanings that the parties bring to the exchange. This requires a richly developed "feel" for interpretation.

3. Transactional Planning.—In planning the strategic structure of transactions, one should think in terms of three functions: identifying and exploiting one's comparative advantage, managing risk, and confirming and authenticating the elements of the exchange. If one undertakes a transaction to capture and create value, then one should ask what comparative advantages she brings to an exchange that will allow her to get more from the asset than current or potential owners. Identifying one's comparative advantage directs attention to opportunities for creative exploitation of these advantages. Managing risk involves the need for an understanding of some theories of risk and for the strategic use of legal tools to **I**dentify, **R**educe, and **S**hift (IRS) risk in the contractual relationship (such as by use of conditions, warranties, title insurance, surveys, and guarantees).[16]

Finally, authentication involves using available tools to validate the "reality" of the transaction (as in avoiding a Ponzi scheme or other forms of fraud). This means that there is a need to authenticate the property, its ownership, and its value. For example, one does a title search and a survey to authenticate the

16. I use "IRS" as an easy way for students to remember what we do in managing risk—first, we learn to identify it, then to reduce it, and then, for risk which cannot be eliminated, we learn how and when best to shift it.

existence of the property and its current ownership, and one does credit checks and examines the documents at closing to ensure that the anticipated exchange is properly accounted for and reflected in the transfer.[17] Part of the problem behind the mortgage market collapse of 2007-09 was improper authentication of the underlying transactions, resulting in billions of dollars of mortgage-backed securities supported by mortgage arrangements of little or no economic substance.[18] The documents representing the underlying transactions did not reflect the authentic nature and value of the actual exchanges.

C. Value

The third key touch point in the real estate transactions process is value. Assuming that real estate transactions are primarily about the transformation, capture, and creation of value, it is important to develop a theory of how best to understand value in particular exchange environments. Value is a complex theoretical subject, but we can begin to understand some basic elements of value by thinking in terms of three transactional categories of value: use value, exchange value, and network value. Use value is about the value derived from being able to use an asset (a house provides shelter). Exchange value is the value, and potential value, that an asset represents as an access point to the market (the ability to borrow against one's home, or the home's value in resale). Network value is the value of an asset in relation to an integrated network of asset exchanges (such as the value of housing in terms of being a source of employment for construction workers and lumber companies, an engine for furniture and appliance sales, and an input item, via mortgage activity, to securitized asset markets).

Value must, of course, also account for different underlying measures of fair market, hedonic, and contingent valuation across the three above-mentioned categories. It also requires knowledge of present discounted value and the extent to which various legal rules account for different definitions of value. Additionally, value should be understood in light of the steps taken to secure a positive outcome while also protecting against failure in any given exchange.

A theory of real estate transactions must therefore account for a number of factors. It must address what can be done with property and what ought to be able to be done with property. It must address the way in which markets are structured and the way in which communities incentivize particular exchange relationships. All of these issues must also be translatable in a form that permits action in pursuit of mission-directed outcomes that are themselves focused on capturing and creating value from exchange in property related assets.

---

17. Many of the things that we do in a real estate transaction are about authentication: authentication of parties, assets, and value. We need to think in terms of the tools that can be used to advance authentication efforts and of the systems that lend themselves to more effective forms of authentication. Transparency is one example of an important element for such a system.

18. Malloy, *Mortgage Market*, *supra* note 5, at 100-01.

II. GENERAL IDEAS CONCERNING ENTREPRENEURSHIP

Entrepreneurship is a relatively new and growing area of interest and study.[19] One can think of entrepreneurship as occurring in three different market settings identifiable as private, public, and social entrepreneurship.[20] In the current context, private entrepreneurship generally involves action taken by private parties to maximize profit and wealth. This action involves setting a private mission to be executed for private gain.[21] Public entrepreneurship relates to the idea of a public entity, such as an elected or appointed body, taking action to promote a public mission as set by actors accountable to the public.[22] Social entrepreneurship relates to actions taken by not-for-profit entities pursuing private missions for the promotion of the public good.[23]

A broader, and I believe more useful, definition of social entrepreneurship would include all entrepreneurship pursued with the goal of adding market value while also advancing a value-based mission other than simply maximizing private wealth. In this Essay, I take the view that these categories are useful because the institutional structure and context of a transaction in property-related assets is important to have in mind when thinking about how best to advance a given mission-directed outcome. These categories help us focus on the differences in the institutional structure of the actors (public, for profit, and not-for-profit). At the same time, we must be aware of the fact that potentially different behavioral patterns related to entrepreneurship may also be operating across these three categories.[24]

In my view, all entrepreneurship, no matter what category, involves some social aspect because entrepreneurship necessarily occurs in a social context.[25] Entrepreneurship arises from exchange and human interaction.[26] It does not occur in isolation. Invention may take place in some respects as an isolated activity, but entrepreneurship is a process and not an event. Furthermore, the entrepreneurship process is facilitated, incentivized, and protected within a given socio-legal environment. In such a setting, it is often difficult to separate the public from private aspects of a given set of activities. Separation becomes increasingly difficult as government credit and financing, as well as tax policy and regulation, work to inform private action and shape reward values related to

---

19. Two useful and important books on entrepreneurship are ISRAEL M. KIRZNER, DISCOVERY AND THE CAPITALIST PROCESS (1985) and ISRAEL M. KIRZNER, THE MEANING OF MARKET PROCESS: ESSAYS IN THE DEVELOPMENT OF MODERN AUSTRIAN ECONOMICS (1992).

20. MALLOY, LAW IN A MARKET CONTEXT, *supra* note 2, at 215-23 (providing a basic introduction to the idea of a three-sector economy consisting of the private, public, and not-for-profit sectors).

21. *Id.* at 216.

22. *Id.* at 217.

23. *Id.* at 218-19.

24. *Id.* at 222-23.

25. *See id.* at 78-94.

26. *Id.* at 94.

particular goals and missions.

In seeking to develop a framework for exploring entrepreneurship, I offer my own working definition, which can include any type of so-called private, public, or social entrepreneurship. In doing so, I discuss entrepreneurship in terms of four patterns of behavior related to what I tentatively identify as the simple transactional, speculator, innovator, and network entrepreneur. Each type of entrepreneur may be pursuing a different mission-directed outcome and brings different expectations and behavior patterns to a property exchange. For purposes of this Essay, I define an entrepreneur as (1) a person with knowledge about an activity and the alertness to spot opportunities for capturing and creating value from potential changes in the existing patterns and practices of that activity (including gaps in information); who (2) exercises judgment concerning the potential value to be gained from exploiting the observed opportunity; and (3) who acts pursuant to that judgment to advance a mission-directed outcome in the hope of transforming perceived potential value into actual value.

An entrepreneur's alertness to new opportunities and the potential for capturing value from creativity presupposes an implicit need for a theory of knowledge and interpretation. This is because creativity requires both an understanding of current boundaries and recognition of a possibility for setting new boundaries and taking new action.[27] Recognizing something as new requires a foundational knowledge base and a cultural-interpretive reference point. Without an understood reference point, one would not appreciate the newness of an idea or action. Thus, interpretation theory is a critical element of our background understanding of entrepreneurship.

In addressing the idea of taking action to advance a mission-directed outcome, we should think in terms of evaluating alternatives with reference to least cost strategies. Least cost strategies can assist in maximizing mission-directed value, and importantly, this is not the same concept as acting to maximize wealth, efficiency, or profit.[28] Value is a more complex concept than wealth or profit and includes variables that are often difficult to quantify. When we think in terms of maximizing value through least cost strategies, we acknowledge that calculating an optimal course of action is impossible in any complex system of exchange and human interaction.[29] The best that can be done is to identify a set of reasonable courses of action given the assumptions and constraints of our mission-directed goals. Consequently, from a least cost strategy approach, one understands that people set mission-based goals and that markets are merely a means for incentivizing particular strategies for achieving these goals.

Before addressing particular behavior-based patterns of entrepreneurship that might be identifiable in real estate transactions, I present a simplified diagram of the entrepreneurial process so that one might have a better understanding of how

---

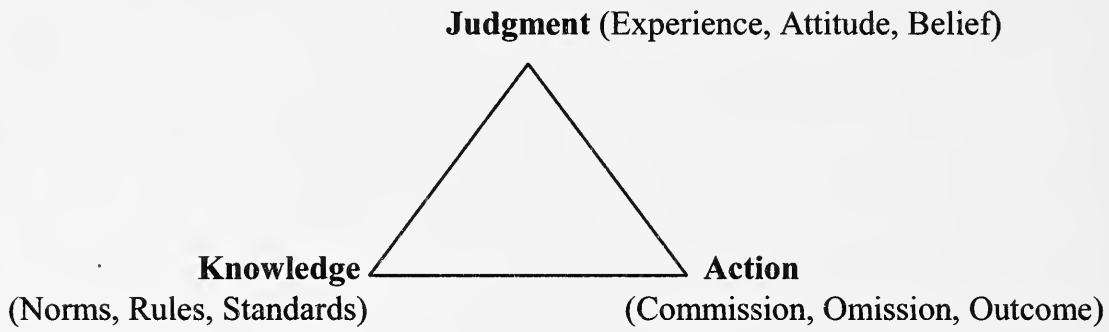
27. *Id.* at 76.

28. *See generally* MALLOY, LAW AND MARKET ECONOMY, *supra* note 1; MALLOY, LAW IN A MARKET CONTEXT, *supra* note 2.

29. *See generally* MALLOY, LAW AND MARKET ECONOMY, *supra* note 1.

the three component parts of the entrepreneurial process fit together.

The Entrepreneurial Process



One way of understanding the function of an entrepreneur is in terms of a triadic assessment based on three key criteria: knowledge, judgment, and action.[30] Although all of these criteria come with a need for theoretical exploration, I offer them here in simplified form as a starting point for understanding the basic process and planning further research.

A. Knowledge

In order to be an entrepreneur, one needs basic knowledge about an activity and an interpretive reference point for understanding the activity's baseline elements. Knowledge includes gaining familiarity and perhaps expertise in the norms, rules, and standards applicable to the activity. This familiarity permits one to be focused and better able to perceive opportunities for value enhancement from subtle changes and shifts in the transactional landscape.

B. Judgment

Knowledge provides a baseline set of skills and tools for understanding exchange, but value arises from the exercise of good judgment applying that knowledge. Judgment can be understood as being shaped or informed by three factors: experience (including an understanding of the feasibility of certain options with respect to market, technical, and legal feasibility), attitude (particularly regarding risk and one's sense of empowerment to make decisions and experiment), and belief (understandable at three levels starting with "asserted belief" based on speculation and hypothesis, "warranted belief" supported by authoritative reference to validation by sources outside of the actor's control, and "actualized belief" upon which action is predicated).[31]

---

30. *See supra* note 13.

31. *See* DANIEL W. BROMLEY, SUFFICIENT REASON: VOLITIONAL PRAGMATISM AND THE MEANING OF ECONOMIC INSTITUTIONS 130 (2006). This book offers an interesting and useful way of thinking about belief. Belief formation is a predicate to choice, and choice is an important part of market analysis. When we first formulate a belief, we are asserting it. Then we look at the belief in terms of trying to determine if it is warranted. Ultimately, we have to decide if it is a belief to

C. Action

Action involves making a choice and can be in the nature of commission or omission. The action is taken pursuant to a judgment about the least cost means of advancing a mission-directed outcome and in the hope of turning potential or speculative value into actualized value.

III. FOUR PATTERNS OF ENTREPRENEURSHIP

Having provided a general idea of a meaning of entrepreneurship and of the entrepreneurial process, I now suggest four patterns of behavior that seem to be identifiable in the consideration of the relationship between entrepreneurship and property-related transactions. I identify these patterns as simple transactional, speculative, innovative, and network entrepreneurship. This section outlines a basic meaning for each of the four patterns with the hope of advancing a more nuanced approach to the discussion of law and its relation to entrepreneurship. The terms I use are simply ones of convenience, and the different patterns are merely suggestions used to begin a conversation about the possibility of identifying elements that might be important in how we incentivize particular exchange relationships within the market.

A. Simple Transactional Entrepreneur

A simple transactional entrepreneur is one who takes action to participate in a routine property transaction that involves a major step for the person, even though it may be rather insignificant from a macro perspective. As an example, consider a person who decides to buy a home. For most people, this is a big personal step, even though it is routine and mundane in the context of millions of such transactions done as relatively standard exchanges. A key motivation in such a transaction is the desire to own a home, and from an economic perspective, the concern is generally to cover accounting costs.[32] Simple transactional entrepreneurs are motivated by a mix of factors and making a large profit is not generally a primary motivator. Home buyers often simply ask: can I afford this home? Home ownership is driven by a set of beliefs constrained by a concern for affordability in its simplest terms.

B. Speculator Entrepreneur

A speculator entrepreneur is motivated by the prospect of big profits and generally enters a transaction based on the pursuit of economic profits rather than

---

act on, thus making it an actualized belief. We also go through this process of trying to turn new ideas into beliefs that others will accept and act on so as to bring about a community of belief that might give rise to a new norm, rule, or standard.

32. Accounting profits are based on covering costs in the sense that an accountant would report expenses against income. *See* MALLOY, LAW IN A MARKET CONTEXT, *supra* note 2, at 149-50; MALLOY & SMITH, *supra* note 5, at 3.

mere accounting profits.[33] The speculator entrepreneur takes on greater risk for the potential upside returns and is likely motivated by a desire to maximize wealth and attain high economic rents. The speculator entrepreneur may not have any original ideas but is willing to take on risk for certain types of transactions or to finance the risk to support others' ideas, assuming that an appropriate potential for return is attached to the risk of a new venture. A person that invests in and flips properties is one example of a speculator entrepreneur. A franchise operator is another example of this type of entrepreneur. Here the franchisee takes on risk but relies on the franchisor's ideas and marketing skills. The franchise business offers the franchisee potential for income and, if the franchise becomes very successful (e.g., McDonald's), a potential for big gains. The speculator entrepreneur looks for the opportunity for a potentially big payoff and the ability to capture an unusually high gain.

C. Innovator Entrepreneur

An innovator entrepreneur is driven by curiosity and has a special alertness to opportunities to capture and create value. Sometimes the activity is purposeful toward a given innovation, whereas sometimes it is directed to a particular end but results in unanticipated innovation. Many times, innovation is simply fortuitous. Generally, innovation is facilitated within certain environments of openness, diversity, and interaction.[34] While needing to cover accounting costs, the innovator entrepreneur also has sustaining economic motivation driven by a Ricardian concept of rents.[35] The innovator by definition acts to develop new ideas and not simply to take on risk.

D. Network Entrepreneur

A network entrepreneur seeks advantage by building and offering access to important networks of exchange.[36] This type of entrepreneur functions as a kind of market intermediary by generating value from various dynamics of the

---

33. In contrast to accounting profits as explained in the prior footnote, economic profits are based on the return one makes from a given undertaking relative to the return that would have been made on a comparable alternative undertaking. Thus, if the market's return on investing in a given property is five percent and I earn only a four percent return on a comparable investment, I have an accounting profit of four percent but a one percent economic loss.

34. MALLOY, LAW AND MARKET ECONOMY, *supra* note 1, at 78-85.

35. *See* MALLOY, LAW IN A MARKET CONTEXT, *supra* note 2, at 176. A Ricardian approach to rent/returns is an older view of rents/profits relative to the current economic approach based on a rent being what one gets over and above the next best offer. Ricardian rents are based on the return obtained from an undertaking that exceeds the minimal amount needed to get a person to participate. Thus, it is based not on opportunity cost, but on what it takes to get someone to pursue an undertaking. Any amount above that minimum is considered a Ricardian rent.

36. *See generally* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006); OZ SHY, THE ECONOMICS OF NETWORK INDUSTRIES (2001).

network itself. For example, this includes investing in and building close links to government officials in order to win government contracts, subsidies, or tax breaks. Cultivation of the network is a key element of the actual work product, or service to be delivered. Value creation is based on the network and not necessarily on the products and services delivered. We observe this behavior in developers that live off of public projects and funding for public-private partnerships. Such developers spend significant time building political networks in order to increase the odds of obtaining these potentially lucrative contracts.

E. Conclusion: Four Patterns of Entrepreneurship

When we look at these four behavioral patterns and understand that different types of entrepreneurship relate to different transactional motivations, we begin to appreciate the idea that perhaps different types of incentives, risk aversion strategies, and regulations will function best in different settings. We also gain a greater appreciation of the factors that might inform one's judgment concerning the best way to strategically structure a transaction. Therefore, when looking at property transactions, it is important to think not only in terms of the institutional structure of entrepreneurship (public, private, and social entrepreneurship), but also in terms of behavioral categories of entrepreneurship. This kind of thinking with respect to multiple forms of entrepreneurship can lead to more appropriately incentivized transactions in property-related assets.

Importantly, we must keep in mind that the above outlined behavioral patterns are offered as useful working tools and guides for analysis. In the real world, these are dynamic and interactive patterns and not discrete silos. In any given transaction, actors may exhibit multiple motivations and move in and out of various elements of a given pattern. Again, the idea is to begin developing tools for further analysis and exploration.

IMPLICATIONS AND CONCLUSIONS

In thinking about real estate transactions, and more broadly, property transactions, it is important to develop a better understanding of entrepreneurship and the relationship between property and exchange. This Essay offers some of my thoughts on how to begin a conversation about these matters. It reflects on the need for greater inquiry into the development of a new approach to understanding real estate transactions as a prototypical example of entrepreneurship. There are many rich questions to be explored.

The Essay suggests that we need to sharpen our understanding of entrepreneurship while seeing its presence in a broader socio-legal setting. We need to develop newer and richer theories of transactions, and we need to recognize that globalization has shifted strategic significance toward exchange theory and away from the already well-developed field of property theory. We also need to think not in terms of different types of transactions, but in terms of a theory of the real estate transactions process.

This Essay offers at least four central starting points for further work. First, it is important to get beyond definitions of property and look at what we can do with property. It is necessary to look at transactions in exchange (asking not just

what property is, but also, and more importantly, what can we do with property), and, from the perspective of market exchange theory, ask how we capture and create value from transactions in property.

Second, entrepreneurship requires us to develop a more complex vocabulary. We need to start thinking about a variety of types of entrepreneurship instead of dealing in an abstract sense with just one big category called "entrepreneurship." We need to develop more nuanced categories of entrepreneurship based on different institutional settings and different observable patterns of behavior.

Third, creativity is a key to entrepreneurship, and this concept requires us to incorporate a theory of knowledge and interpretation into our basic approach. This is necessary because creativity requires both an understanding of the current boundaries of meaning (knowledge) and recognition of simultaneous opportunities for creating new boundaries and meanings. Interpretation theory enables a sense of understanding and offers a framework for imagining the potential for something new and different.

Finally, the relationship between law and entrepreneurship requires a dynamic approach to market theory. Traditional efficiency analysis is not entirely helpful because it has a substantially incomplete theory of creativity. Efficiency is directed at thinking about the alternative ways of allocating known resources. It is not about the market conditions under which creativity, innovation, and discovery are best facilitated. Therefore, there is a need to think creatively about the meaning of markets and the tools we use to understand law in a market context.

More immediately, some readers may wonder if such an approach can be successfully applied in the classroom. I think that it can. I believe that it can be one way of explaining the real estate transactions process, and I also believe that understanding a theory of why and how things fit together can improve one's judgment as a transactional lawyer while enhancing alertness to new opportunities for gain.

In teaching my real estate transactions course, I tell my students that transactions are about creating value, looking into the future, and turning dreams into reality. The real estate transactions process is always focused on a mission-directed outcome, and the real estate lawyer needs to harness elements from almost every part of the law school curriculum, plus knowledge of markets and politics, to transform a vision into reality.[37] Therefore, in teaching a real estate transactions course, I believe it is important to orient students toward the future. Students need to understand that planning into the future is a creative and highly risky activity. The longer the time horizon, the more complex the exchange, and the more abstract the goal, the greater the uncertainty. Thus, it is important to understand the individual pieces of a transaction as part of a dynamic and integrative process. It is easy to state the subject matter of real estate transactions, as they simply involve "fixed assets exchanged for value."

---

37. This is a different undertaking than that of a trial lawyer, for example. Trial work is about reconstructing the past and creating narratives of history. Real estate transactions, in contrast, are about imagination and the creation of new narratives that shape our future landscapes.

Translating this definition into something meaningful is the difficult part. To do this, I use materials that present the basic norms, rules, and standards applicable to the subject matter, which permit me to set up the examination of the three key touch points of the real estate transactions process. In other words, I tell students that they are going to need to learn about the process of assetization (fixing of assets) and its relationship to the strategic structuring of exchange in an effort to transform, capture, and create value.

At the outset, students need to be reoriented in at least two important ways. First, students need to understand that because transactions are about exchange, everything needs to be understood in a market context. Second, it is important for them to understand the position of property law in relation to the study of transactions. The students in real estate transactions need to appreciate that the course is not about "what is property" (even though this is important), but it is about what we do with property to successfully capture and create value for our clients and the community.

With this in mind, the entire course can be organized, synthesized, and understood in relation to the three key touch points outlined in Part I of this Essay. For example, students must first understand the asset forming the subject of an exchange. Topics related to deeds, estates, surveys, and title examination, for example, go to establishing the quantity and quality of the interest being transferred and are all about fixing and confirming the asset. Second, students must contemplate various strategies for planning and executing the transaction. Here they need to think about alternative ownership forms, competing financial structures, methods of authenticating the various elements of the exchange, and the strategic use of rules related to conditions, warranties, inspections, and risk management. In each of these examples, their focus is on the exchange function. Finally, students must evaluate the structure of the exchange relative to the mission-directed goal, and assess and protect the value expectations for the transaction. This might involve determining the most appropriate method of pricing, financing, and dealing with the asset at foreclosure or in bankruptcy. Some topic areas naturally overlap, but in general, students can understand different aspects of a real estate transactions course in terms of these three touch points: (1) fixing assets and (2) structuring exchanges in an effort to (3) transform, capture, and create value.

Moreover, each individual case throughout my course serves as a prototypical example of the overall process. Each case can be broken down in a variety of ways, and in almost all situations, one can discuss a case in terms of the nature of the fixed asset involved, the strategic structure used in the exchange, and the value-related issues expressly or implicitly present in the transaction. The process does not always need to be explicit for students, as they can learn much of it indirectly by observing and participating in the application of the process to case analysis and discussion of illustrative transactions.

As we work through the understanding of the real estate transactions process, I keep students aware of what we are doing in terms of the broader entrepreneurial process. I tell them that they will ultimately be assessed as lawyers in the same way that they will be as entrepreneurs and facilitators of entrepreneurs. The assessment will be based on their ability to add value to an

exchange as a result of their knowledge, judgment, and actions. They must learn the rules in order to have a basis for exercising good judgment, but judgment is not simply about knowing rules or understanding documents. Likewise, the ultimate indicator of their knowledge and judgment is the action they take. Students not only need to know the rules and how to use the rules in formulating judgments about alternative courses of action; they need to be able to recognize how all of this translates into the steps one needs to take in order to add value and make things happen in the real world.

All of the above takes practice and can start with simple examples such as asking students what they need to do once they know that state law requires a grantor and a grantee on a deed (basic knowledge of a foundational rule). With this simple rule easily understood, I ask them what they need to do if the grantor is a corporation. This is where knowledge and judgment confront action. What they need to do, of course, is figure out how to authenticate the corporation's ability to act as a legally recognizable grantor capable of transferring the asset in accordance with the terms of the contract of exchange and the instrument of conveyance (this involves judgment—a judgment based on knowing that a corporation may need to meet certain criteria in order to be considered a valid grantor). The question then becomes one of identifying the action one needs to take pursuant to forming this judgment. Acting on this judgment, an attorney should do such things as review the articles of incorporation, obtain the certificate of good standing, review the resolution of the board in approving the exchange, and clarify the person or persons authorized to sign the documents that materially effectuate the transfer.

Using cases and problems, each transaction can be broken down into issues of *knowledge* (basic rules, standards, and norms), *judgment* (the strategies considered and that might have been considered in structuring the transaction), and *action* (the positive and negative consequences of the actions actually taken in the exchange, and potential alternatives). By continually focusing on the acquisition of knowledge, the exercise of judgment, and the execution of action, students will learn to translate the substantive elements of the real estate transactions course into actions that add value. In so doing, the students will not just facilitate their clients' mission-directed goals; they will themselves become entrepreneurs.

DISCRIMINATORY HOUSING ADVERTISEMENTS ON-LINE: LESSONS FROM CRAIGSLIST

RIGEL C. OLIVERI*

TABLE OF CONTENTS

---

* Associate Professor of Law, University of Missouri School of Law. B.A. University of Virginia, J.D. Stanford Law School. The author was formerly a Trial Attorney for the U.S. Department of Justice's Civil Rights Division, in the Housing & Civil Enforcement Section. I am grateful for comments and suggestions from Bob Schwemm, Tim Iglesias, Ann Houghtaling, and Michael Byrne. I would like to thank my research assistants, Carly Duvall and Tressa Kelly and my library liaison, Cindy Shearrer, for their excellent assistance. I sincerely appreciate the generous support of the University of Missouri's Summer Faculty Research Program.

INTRODUCTION

Suppose you live in a two-bedroom apartment and your roommate moves out. You want to stay in the apartment, but you cannot afford the rent on your own, so you go to an on-line housing locator site like Craigslist and post an ad under "Roommate Wanted." Because you work from home, you would prefer a roommate who does not party late into the night and who does not have small children who will make noise. You state this in your posting. Two candidates contact you. One has a two year-old. One has no kids. You select the childless candidate. You might think that you have just engaged in an ordinary roommate-seeking transaction, the likes of which occur every day. You would be right. But you have also violated the federal Fair Housing Act (FHA) and are subject to civil prosecution for posting a discriminatory advertisement and also probably for discriminating on the basis of familial status in your choice of a roommate.

The law governing discriminatory on-line advertisements for housing is complex, and involves a collision of federal statutes. Section 3604(c) of the FHA makes it illegal "[t]o make, print, or publish" discriminatory housing statements, notices, or advertisements.[1] While this section clearly applies to housing providers and professionals who make discriminatory housing-related statements. Because of the statute's "print or publish" language, it has also been applied to newspapers, television, radio, and any other media that carry discriminatory advertisements. Publisher liability for discriminatory housing ads has been the law for decades.[2] Because newspapers and other media have the incentive to screen out discriminatory advertisements, such advertisements have largely vanished from public view.[3]

---

1. 42 U.S.C. § 3604(c) (2006).
2. 17 AM. JUR. 2D *Civil Rights* § 3604(c) (2006).
3. *See* Andrene N. Plummer, Comment, *A Few New Solutions to a Very Old Problem: How*

Websites that feature advertisements for housing, like traditional print media, would certainly be covered by the FHA's advertising prohibitions. But in an effort to encourage the growth of the Internet as a tool for commerce and the exchange of ideas, Congress passed the Communications Decency Act of 1996 (CDA), which shields website operators from liability for the contents of user-generated material that appears on their sites.[4] This negates the publisher liability provision in § 3604(c) with respect to many website operators.

Without the threat of publisher liability, websites have no incentive to screen out discriminatory ads. At the same time, anyone with access to a computer can instantly post housing advertisements on-line, usually without charge and with some level of anonymity. The result is that discriminatory housing ads proliferate in cyberspace. And although the websites that host the ads are immunized from liability, the individuals who post the ads are not.

This situation is problematic from a fair housing standpoint. But it also presents a valuable opportunity for the study of what the Legal Realists call "law in action."[5] For the first time in a generation, discriminatory housing advertisements are out in the open and available for study. In a sense, these advertisements allow us to see the mental process of the people who place them. We can examine the discriminatory ads to determine who places them, what sort of housing they involve, and what sort of discrimination is at issue. We can also get a sense for how common discriminatory housing ads are on-line, so that we can determine the extent of the problem they present.

This Article contains a comprehensive review of discriminatory housing ads appearing on the popular online community Craigslist. This review reveals that a significant number of on-line housing ads—roughly several hundred on any given day—violate the FHA. A detailed examination of the content of the ads yields a number of interesting findings. For example, the vast majority of those who post discriminatory on-line advertisements for housing are placed by people seeking roommates. Roommate ads are also qualitatively different from ads for traditional rental housing. They often contain highly specific preferences about characteristics that are not protected by the law (such as diet, political affiliation, and cleanliness) and would not be used in an advertisement for a traditional rental. Similarly, roommate ads also frequently contain detailed descriptions of the person who placed the ad in terms of nonprotected characteristics. These ads represent an advertiser looking for much more than simply someone with whom to share rent. The roommate relationship is an intimate one. Most roommate-seekers seem to be looking for someone with similar attitudes, habits, backgrounds, and lifestyles.

Although ads that discriminate based on race, religion, or ethnicity are the most jarring (and have received the most publicity), there are actually very few of them. The overwhelming majority of ads that violate the FHA discriminate

---

the Fair Housing Act Can Be Improved to Deter Discriminatory Conduct by Real Estate Brokers, 47 HOW. L.J. 163, 178 (2003).

4. 47 U.S.C. § 230(c) (2006).

5. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 14 (1910).

on the basis of familial status, which is defined as whether a person is the custodial parent or guardian of a minor. When the ads are divided between traditional rentals and roommates, this pattern is even more pronounced. Virtually none of the ads for traditional rental housing express a racial, ethnic, or religious bias. Instead practically all discriminate based on familial status.

Of the few roommate ads that do mention race, ethnicity, or religion, the discrimination is not consistently anti-minority. Instead, it tends to go in all directions. Put another way, one is just as likely to see an ad expressing a preference for a "Muslim woman of color" as for a "white Christian male." Moreover, many of the ads that mention race, religion, or ethnicity do not state a preference for a particular type of roommate at all but rather contain a self-description of the person taking out the ad, as in "white Christian male seeks roommate."

This information is useful in formulating appropriate responses to the problem of discriminatory on-line housing advertisements, both in terms of improving legislation and public awareness of the law. One conclusion is clear: Given the large numbers of discriminatory ads that are out there and the enormous practical difficulties of prosecuting the individuals who post the ads, the most effective way to reduce the number of discriminatory on-line housing ads is to create publisher liability for the websites who host them. To accomplish this Congress would need to amend the CDA to include an exception for discriminatory housing ads.

Although amending the CDA will solve the problem of discriminatory ads by incentivizing websites to screen them out, we should also make use of the information we have learned from looking at the ads. For example, it appears that there is a problem with applying the FHA to roommates. The FHA contains an exemption for small landlords who live in the same building as their tenants, designed to safeguard the privacy and associational rights of property owners who live in close proximity to their tenants.[6] The exemption, however, does not cover co-lessees who seek to live together as roommates. Moreover, the exemption does not include § 3604(c), so an exempt landlord is still prohibited from advertising discriminatory preferences. The sheer number of potentially discriminatory roommate ads suggests that many roommate-seekers are unaware that the law applies to them and their advertisements, which is understandable given the complexity of the law. Additionally, the nature of the ads—with their emphasis on personal characteristics—helps demonstrate the intimacy of the roommate relationship. When people are advertising for roommates, they are often seeking more than just a person to share rent; they seek a friend, or at least a like-minded companion. There is an apparent social norm that people view the selection of a roommate as a highly personal, individualized choice, in which government interference is inappropriate. This indicates that the FHA's current small-landlord exemption should be reconfigured to protect roommates.

The data also make clear that the problem of discriminatory housing advertisements is overwhelmingly one of familial status discrimination,

---

6. 42 U.S.C. § 2000a(b)(1) (2006).

regardless of whether shared or traditional rental housing is at issue. This suggests that there is a problem both with public awareness of the law and public acceptance of the law. Campaigns should be undertaken by the Department of Housing and Urban Development (HUD) and fair housing advocates to educate people about the law and the need for it.

Part I of this Article discusses the FHA, with a particular emphasis on § 3604(c) and the Act's exemption for small landlords. Part II describes the conflict between the FHA and the CDA and the cases that address this conflict. Part III sets forth the results of a comprehensive review of discriminatory on-line housing advertisements, in terms of who takes them out, what they look like, what sort of housing they involve, and what the grounds are for discrimination. Part IV contains a preliminary analysis of the data, focusing on the fact that most discriminatory ads are taken out by roommates and the fact that the overwhelming majority of discriminatory ads discriminate on the basis of familial status. Part V puts forth policy and legislative proposals as informed by the data, existing case law, and social norm theory: the CDA should be amended to take § 3604(c) into consideration, so that website operators are liable for discriminatory housing ads posted to their sites by users; the FHA's exemptions should be reconfigured to cover people in shared living situations and not small landlords; roommates—and only roommates—should be permitted to advertise their discriminatory preferences; and increased efforts must be made to educate the public and shift social norms about familial status discrimination in housing.

I. THE FHA AND THE BAN ON DISCRIMINATORY HOUSING ADVERTISEMENTS

Enacted in 1968, the FHA was intended "to provide, within constitutional limitations, for fair housing throughout the United States."[7] This broad statement of purpose underscored the objective of its proponents to replace America's segregated residential landscape with "truly integrated and balanced living patterns."[8]

A. Overview of the FHA

As originally enacted, the FHA prohibited housing discrimination based on four protected characteristics: race, color, religion, and national origin. Sex was added to the list of protected characteristics in 1974,[9] and disability and familial status were added in 1988.[10] Although the FHA is a lengthy statute, most of the statute focuses on the manner in which the Act is to be enforced. The relatively

---

7. *Id.* § 3601.

8. 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale).

9. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 109, 88 Stat. 633 (1974).

10. Fair Housing Amendments of 1988, Pub. L. No. 100-430, § 5, 102 Stat. 1619 (1988); 42 U.S.C. § 3604 (2006). "Familial status" refers to whether one is the custodial parent or guardian of a minor child. *Id.* § 3602(k).

few substantive provisions are contained in §§ 3604, 3605, 3606, and 3617.[11] Of these, the most significant is § 3604, which is divided into several subparts.

Section 3604(a) prohibits discriminatory refusals to sell or rent a dwelling, or to negotiate for the sale or rental of a dwelling, and any other conduct that makes housing unavailable because of a protected characteristic.[12] Section 3604(b) bans discriminatory terms and conditions in the sale or rental of dwellings, and the discriminatory provision of services and facilities in connection therewith.[13] Section 3604(c), which is discussed in greater detail below, makes it illegal to make or publish discriminatory housing statements or advertisements based on a protected characteristic.[14] Section 3604(d) forbids making false representations to a person that a property is unavailable, when such representation is made because of a protected characteristic of that person.[15] Taken together, these provisions were intended to encompass the full range of ways in which housing discrimination could be carried out.

B. The Ban on Discriminatory Statements

The FHA's ban on discriminatory statements, 42 U.S.C. § 3604(c), makes it unlawful

> [t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on [protected characteristics], or an intention to make any such preference, limitation, or discrimination.[16]

The need for a provision like this is clear. Without one, housing providers could (and did) discriminate based on protected characteristics by simply telling a particular housing-seeker that the housing was off-limits to him or her. A published advertisement could achieve this result more easily, as it would reach a larger group of people, and persuade the disfavored ones from even attempting to buy or rent the housing.

Until recently, § 3604(c) "has not been the subject of much litigation or debate,"[17] and often has little independent significance. This may be because litigants and commentators tend to focus on statutory provisions such as §§

---

11. 42 U.S.C. §§ 3604, 3605, 3606, 3617 (2006).
12. *Id.* § 3604(a).
13. *Id.* § 3604(b).
14. *Id.* § 3604(c).
15. *Id.* § 3604(d).
16. *Id.* § 3604(c).
17. Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 191 (2001) [hereinafter Schwemm, *Discriminatory Housing Statements*]. Professor Schwemm goes on to discuss the large number of fair housing cases that contain evidence of discriminatory statements but where § 3604(c) claims have neither been pursued by plaintiffs nor recognized by courts. *Id.* at 255-63.

3604(a) and (b), that prohibit discriminatory conduct, as opposed to discriminatory speech (although the lines between these can be blurry).[18] This focus, in turn, is likely because the damages for a denial of housing or a terms and conditions violation tend to be higher than the damages for a discriminatory statement. For a §§ 3604(a) or (b) claim, the plaintiff is entitled to compensatory damages caused by the denial of housing or the discriminatory terms, whereas the plaintiff's compensatory damages for a § 3604(c) claim are limited to the emotional harm caused by hearing or reading the statement itself.[19] Absent extraordinary circumstances, this is not likely to translate into a very high dollar amount.[20]

Nonetheless, § 3604(c) occupies an important position in Congress' plan for comprehensive open housing legislation, and defendants ignore it at their peril. One indication of the significant role Congress intended for § 3604(c) to play is the fact that the coverage of this provision is more extensive than other substantive provisions of the FHA. Additionally, the wording of § 3604(c) guarantees that it will apply in multiple and varied contexts.

1. The Extensive Reach of § 3604(c).—The reach of § 3604(c) is quite broad in a number of ways. First, it applies regardless of the speaker's intent. The statutory language only requires that the statement convey a preference or limitation to the "ordinary listener" or the "ordinary reader," not that the speaker have intended to convey such a preference or limitation.[21] As a result, § 3604(c) has been referred to as a "strict liability" provision.[22]

---

18. Often, a § 3604(c) violation will accompany a denial of housing under § 3604(a) or a terms and conditions violation under § 3604(b), for the simple reason that people who engage in discrimination tend to make statements to that effect. Moreover, a denial of housing or discrimination in terms and conditions can be accomplished by means of a discriminatory statement, for example, a landlord who tells a black applicant "I won't rent to you because you are black" or a landlord who posts a building rule that "Children are not allowed in the common areas." In those cases, there have been two violations, both the statement and the denial of housing or the discriminatory terms that the statement represents.

19. *See, e.g.*, HUD v. Denton, Fair Hous.-Fair Lending Rptr. ¶ 25,014 (H.U.D. A.L.J. Nov. 12, 1991), *available at* 1991 WL 442794, *remanded to* Fair Hous.-Fair Lending Rptr. ¶¶ 25,024, 25,281 (H.U.D. A.L.J. Feb. 7, 1992), *available at* 1992 WL 406537 (awarding family no damages for a § 3604(c) violation, because any harm suffered was the result of eviction, rather than the discriminatory statement that accompanied their eviction notice). Punitive damages are available to individual litigants for all FHA violations, 42 U.S.C. § 3613(c) (2006), and the government can also obtain a civil penalty for these violations under appropriate circumstances. *See* 42 U.S.C. §§ 3612(g)(3), 3614(d)(1)(C) (2006).

20. *See, e.g.*, HUD v. Dellipaoli, Fair Hous.-Fair Lending Rptr. ¶ 25,127 (H.U.D. A.L.J. Jan. 7, 1997), *available at* 1997 WL 8260 (awarding plaintiffs $500 for hearing discriminatory statement).

21. Ragin v. N.Y. Times Co., 923 F.2d 995, 1002 (2d Cir. 1991). The court noted that "[t]he ordinary reader is neither the most suspicious nor the most insensitive of our citizenry." *Id.*

22. HUD v. Roberts, Fair Hous.-Fair Lending Rptr. ¶ 25,151, at 26,217 (H.U.D. A.L.J. Jan. 19, 2001), *available at* 2001 WL 56376; *Dellipaoli*, ¶ 26,077; *see also* Schwemm, *Discriminatory*

Moreover, § 3604(c) does not just prohibit blatantly discriminatory statements such as "I will not rent to black people." This is because there are a number of ways a person can communicate discriminatory feelings. Subtle discriminatory messages can be just as effective as flagrant ones in dissuading people from attempting to procure housing. As the Second Circuit Court of Appeals held in *Ragin v. New York Times Co.*:

> We do not limit the statute-not to say trivialize it-by construing it to outlaw only the most provocative and offensive expressions of racism or statements indicating an outright refusal to sell or rent to persons of a particular race. . . . Ordinary readers may reasonably infer a racial message from advertisements that are more subtle than the hypothetical swastika or burning cross, and we read the word "preference" to describe any ad that would discourage an ordinary reader of a particular race from answering it.[23]

If § 3604(c) were limited to only the most direct statements of bias, housing providers could just move to using more subtle messages and still accomplish largely the same results. This, as the court has recognized, would defeat the whole purpose of the law.[24] Courts therefore employ an "ordinary reader" or "ordinary listener" standard when evaluating § 3604(c) cases.[25] The ordinary reader, it is said, "is neither the most suspicious nor the most insensitive of our citizenry."[26]

HUD has published guidance and regulations describing the sort of communications that would likely be deemed to violate § 3604(c).[27] This

---

Housing Statements, *supra* note 14, at 215-16.

23. *Ragin*, 923 F.2d at 999-1000.

24. United States v. Hunter, 459 F.2d 205, 215 (4th Cir. 1972) ("If an advertiser could use the phrase 'white home' in substitution for the clearly proscribed 'white only,' the statute would be nullified for all practical purposes.").

25. *See id.* at 213-14; *see also Ragin*, 923 F.2d at 999; Spann v. Colonial Vill., Inc., 899 F.2d 24, 29 (D.C. Cir. 1990) (applying a "reasonable reader" standard); Blomgren v. Ogle, 850 F. Supp. 1427, 1439 (E.D. Wash. 1993).

26. *Ragin*, 923 F.2d at 1002.

27. HUD's Regulations on discriminatory advertising can be found at 24 C.F.R. § 100.75. Under the doctrine set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, HUD regulations interpreting the FHA are to be followed so long as they are "a permissible construction of the statute." 467 U.S. 837, 842-44 (1984). A number of FHA decisions have deferred to HUD's interpretive regulations pursuant to *Chevron*. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW & LITIGATION 7:4 n.17 (2007) [hereinafter SCHWEMM, HOUSING DISCRIMINATION].

In addition, HUD adopted a detailed set of "Advertising Guidelines for Fair Housing" in 1972, which it later published in a set of regulations that appeared for many years at 24 C.F.R. §§ 109.5-109.30 [hereinafter HUD Guidelines], *available at* http://www.fairhousing.com/index.cfm?method=page.display&pageid=605. In 1996 HUD removed these regulations because it felt that such "guidance did not amount to regulatory requirements that were appropriate for codification in the Code of Federal Regulations." Streamlining of HUD's Regulations Implementing the Fair Housing

authority makes clear that the "ordinary reader" standard will be satisfied by more subtle discriminatory statements. For example, advertisements should not contain a description of the landlord, current tenants, or area that mentions protected characteristics, such as "white private home," "Christian," or "Hispanic residence."[28] Section 3604(c) can be violated by catch words or colloquialisms if used in a discriminatory context, such as "exclusive" and "restricted" development or "mature persons" preferred.[29] Non-verbal visual depictions, including symbols and human models can also communicate discriminatory preferences sufficient to violate the statute.[30] Merely asking about the protected characteristics of a homeseeker may constitute a violation, under the theory that in most cases such characteristics are irrelevant. Any inquiry implies that a housing decision will nevertheless be made on that basis.[31]

By its terms, § 3604(c) applies not only to the individuals who draft and place discriminatory advertisements, but also to the newspapers and other media who "publish" such advertisements. In an early and influential case, *United States v. Hunter*, the Fourth Circuit held that a newspaper could be liable for printing a classified ad for an apartment in a "white home."[32] Working from the statutory language, the court reasoned that, "[i]n the context of classified real estate advertising, landlords and brokers 'cause' advertisements to be printed or published and generally newspapers 'print' and 'publish' them."[33] In the wake

---

Act, 61 Fed. Reg. 14,380 (Apr. 1, 1996). Although HUD stated that it would provide the information in a handbook or other materials rather than maintain it in the C.F.R., *id.* at 14,378, it has so far failed to do so. Nevertheless, the remaining HUD Regulations continue to refer to the material in Part 109, as does a 1995 internal HUD memo regarding discriminatory advertising that was made available to the public. *See* Memorandum from Roberta Achtenburg, Assistant Sec'y for Fair Hous. and Equal Opportunity (Jan. 9, 1995), *reprinted in* Fair Hous.-Fair Lending ¶ 5365 [hereinafter HUD Memo] (providing guidance regarding advertisements under § 3604(c) of the FHA). For a thorough discussion and history of HUD's advertising regulations and guidance, see SCHWEMM, HOUSING DISCRIMINATION, *supra*, 15:3, at 15-8 to -11.

28. HUD Guidelines, *supra* note 27, at 109.20(a), (e)-(f).

29. *Id.* at 109.20(a)(8), (d).

30. *Id.* at 109.20(c), 109.25(c). In *Ragin v. New York Times Co.*, a newspaper was found liable for publishing thousands of housing advertisements over a multi-year period that consistently featured only whites as homeseekers, homeowners, and tenants. 923 F.2d 995, 998 (2d Cir. 1991). According to the plaintiffs, the few people of color in the ads were usually depicted as service employees. *Id.* at 1001.

31. *See, e.g.*, Jancik v. Dep't of Hous. & Urban Dev., 44 F.3d 553, 554-57 (7th Cir. 1995) (finding landlord's telephone inquiry as to the race of prospective tenant violated § 3604(c)); *cf.* Soules v. Dep't of Hous. & Urban Dev., 967 F.2d 817, 824-25 (2d Cir. 1992) (recognizing that rental agent's query about prospective tenant's children could in theory violate § 3604(c), but finding that the circumstances of the conversation did not indicate potential discrimination).

32. 459 F.2d 205, 221 (4th Cir. 1972).

33. *Id.* at 210. The decision in *Hunter* was reinforced a few months later by the decision *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (en banc). In that case, the D.C. Circuit held that § 3604(c) prohibited the recording of deeds with racially restrictive covenants, and that the

of the decision in *Hunter*, newspapers and other media had a clear legal incentive to screen out discriminatory housing advertisements. As a result, discriminatory housing ads all but vanished from sight for many years.[34]

Finally, § 3604(c) has a greater reach than other substantive parts of the FHA in that it applies to defendants that are otherwise exempt from the statute. Put another way, there are several categories of defendants who are allowed to engage in discriminatory housing behaviors, but who are still not permitted to make discriminatory statements or to advertise their discriminatory preferences.[35]

2. Limitations to § 3604(c).—There are just a few significant limitations to § 3604(c). The first is the requirement of a relationship between the speaker and the housing transaction at issue. Because the statute requires that the discriminatory statement be made "in connection with the sale or rental" of housing, the discriminatory statement must be made within the context of a sale or rental transaction or relationship, or by an individual such as a housing provider who can in some way affect such a transaction or relationship.[36] This means that, for example, a neighbor is not typically in a position to violate § 3604(c) by making biased statements (although if such statements are sufficiently egregious or harassing to interfere with a neighbor's enjoyment of her home, they may violate other provisions of the FHA).[37]

The First Amendment creates a related—although narrow—limitation. As a content-based restriction on speech, § 3604(c) has long come under attack on First Amendment grounds. But because the provision is limited by its terms to statements or advertisements that are connected to a sale or rental transaction, the speech at issue in a § 3604(c) case should virtually always be considered commercial speech.[38] This is particularly so for discriminatory advertising,

---

Recorder of Deeds could be liable for accepting such deeds. *Id.* at 638.

34. *See* SCHWEMM, HOUSING DISCRIMINATION, *supra* note 27, § 15:3, at 15-9 (noting that after *Hunter*, "litigation involving the more blatant forms of discriminatory advertising all but ceased"); Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 220.

35. This will be discussed at greater length in *infra* Part I.C.

36. Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 22 (2008). This does not mean that only owners and real estate professionals are proper defendants under § 3604(c). Anyone who is in a position to affect a sale or rental transaction—including people who advertise for roommates—can potentially violate this part of the statute.

37. *Id.* at 34-35; Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 265-66.

38. Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 269-70. Discriminatory statements that are unrelated to any particular housing transaction, on the other hand, are unlikely to be considered commercial speech and any attempt to read § 3604(c) as prohibiting them will be barred by the First Amendment. *See, e.g.*, Wainwright v. Allen, 461 F. Supp. 293, 298 (D.N.D. 1978) (finding that a bigoted statement by landlord to HUD investigator was not in the context of any transaction, and so First Amendment prevented it from serving as the basis for civil liability); United States v. Real Estate One, 433 F. Supp. 1140, 1154 n.8 (E.D. Mich. 1977) (suggesting, in dicta, that one housing salesperson's racially offensive remark to another would be protected speech if not made in connection with a particular sale transaction).

which is clearly speech "proposing a commercial transaction" under the Supreme Court's definition.[39] Although still covered by the First Amendment, commercial speech is given less constitutional protection than other forms of speech, specifically, it can be prohibited if it is factually misleading or if it concerns unlawful activity.[40] Thus, most discriminatory housing statements and advertisements can be banned because housing discrimination is illegal, and a statement of discriminatory housing preference inaccurately implies that protected characteristics may form the basis of a housing decision.[41]

Finally, HUD has defined a very narrow category of ads that, in the agency's view, should be exempted from § 3604(c): It is permissible to state that housing is limited on the basis of sex where the sharing of living areas is involved, or when the dwelling at issue is a dormitory facility used by an educational institution.[42] Although nothing in the language of the statute indicates that there should be an exception for sex-specific ads for shared housing, the agency clearly recognized that significant social norms and personal concerns (such as safety, modesty, and morality) would be implicated absent such an exception.

C. The "Mrs. Murphy" Exemption

The FHA contains four specific exemptions, the most significant of which for this discussion is the so-called "Mrs. Murphy exemption."

1. Coverage and Rationale.—Named for a fictitious elderly Irish widow who is forced to rent out rooms in her home to make ends meet,[43] the exemption covers rooms or units in dwellings intended to be occupied by four or fewer families[44] so long as the owner of the building lives in one of the units.[45] Such owners are exempt from most—but not all—of the substantive provisions of the

---

39. Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562 (1980).

40. *Id.* at 563-54.

41. The FHA's exemptions for particular defendants and types of housing from all of the substantive provisions in the statute *except* § 3604(c) causes a problem for this reasoning, because it creates a situation in which the underlying conduct is not illegal. This dilemma is discussed in the following section.

42. HUD Guidelines, *supra* note 27, § 109.20 (6)(5); HUD Memo, *supra* note 27, at 2-3.

43. The concept of Mrs. Murphy originated in the legislative debate over a different piece of legislation, the Public Accommodations title in the Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006). At that time, Mrs. Murphy was conceived of as the operator of a boardinghouse (which would have been covered as a public accommodation) who rented out rooms in her home to transient guests. *See* James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exception to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 608 (1999) (citing 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1154, 1741-44, 1194 (Bernard Schwartz ed., 1970)). She later resurfaced during the debates over the FHA, this time as a landlady who owned and lived in a building and who rented out other units in the building to tenants. *See* the discussion *infra* notes 55-59 and accompanying text.

44. The FHA defines "family" to include "a single individual." 42 U.S.C. § 3602(c) (2006).

45. *Id.* § 3603(b)(2).

FHA.[46] Thus, a Mrs. Murphy landlord is free to refuse to rent to minorities because of their race, behavior that would otherwise violate § 3604(a). She may also impose discriminatory terms and conditions upon her minority tenants, such as higher rents or security deposits, which for other landlords would violate § 3604(b). And she may lie to minorities who inquire about housing, telling them she has no vacancies when in fact she does, which would violate § 3604(d) if not for the exemption.[47]

The rationale behind the Mrs. Murphy exemption was the protection of the privacy and associational rights of small landlords who live in close proximity to their tenants.[48] Mrs. Murphy first appeared in the debates over Title II of the Civil Rights Act of 1964, which addressed public accommodations, including hotels and other places of temporary lodging.[49] Senator George D. Aiken of Vermont came up with the concept of Mrs. Murphy in order to argue that small boarding house operators should not be treated the same as big commercial hotels under the Act. He suggested that Congress "integrate the Waldorf and other large hotels, but permit the 'Mrs. Murphys,' who run small rooming houses all over the country, to rent rooms to those they choose."[50]

A boarding house or rooming house was typically just a house in which transient guests occupied the various bedrooms.[51] The boarders did not have their own bathroom, kitchen, or living area. The only thing separating Mrs. Murphy from her boarders was a hallway, perhaps a flight of stairs, and her own bedroom door. This is a very intimate living situation, in which concerns of privacy and owner discretion are significant. In fact, the owner's discretion to "receive or reject whom he or she wishes" is part of the very definition of the

---

46. *Id.* § 3603(b).

47. *Id.* Indeed, it behooves Mrs. Murphy to lie to potential tenants who she wishes to reject for discriminatory reasons. As discussed in this Part, Mrs. Murphy is not exempt from § 3604(c), which means that she is not permitted to advertise or to make any "statement" of her discriminatory preferences. Thus, she may discriminate against minorities without penalty, but she cannot tell them the real reason for their rejection. *See* Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 192-93.

48. As Senator Walter Mondale, co-sponsor of the FHA, stated: "The sole intent of [the Mrs. Murphy exemption] is to exempt those who, by the direct personal nature of their activities, have a close personal relationship with their tenants." 114 CONG. REC. 2495 (1968) (statement of Sen. Mondale); *see also* John T. Messerly, Note, *Roommate Wanted: The Right to Choice in Shared Living*, 93 IOWA L. REV. 1949, 1960-74 (2008) (arguing that the Mrs. Murphy exemption implicates constitutional rights of privacy, intimate association, expressive association, and possibly the free exercise of religion).

49. *See* 42 U.S.C. § 2000a (2006).

50. ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964, at 51 (1990).

51. 40A AM. JUR. 2d *Hotels* § 5. The only difference between a boarding house and a rooming house or lodging house is that boarding houses typically also provided one or more meals as part of the arrangement. This Article will refer to "boarding houses" because that is what Mrs. Murphy is typically referred to as operating.

term "boarding house."[52] During the debates over Title II, Senator Hubert Humphrey stressed that:

> There is no desire to regulate truly personal or private relationships. The so-called Mrs. Murphy provision results from a recognition of the fact that a number of people open their homes to transient guests, often not as a regular business, but as a supplement to their income. The relationships involved in such situations are clearly and unmistakably of a much closer and more personal nature than in the case of major commercial establishments.[53]

These concerns resonated with Congress, which ultimately defined Title II's coverage as follows:

> any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence.[54]

In 1968 Mrs. Murphy reappeared in the FHA as a property owner who rented out "rooms or units in dwellings containing living quarters . . . intended to be occupied by no more than four families living independently of each other."[55]

The language of the exemption clearly states that it only covers "owner[s]."[56] Because exemptions to the FHA are to be narrowly construed, it would be improper for a court to interpret this term to include renters or tenants.[57] A comment in the legislative debates from one of the FHA's opponents also makes clear that the exemption is not broad enough to cover renters:

> Furthermore, the limited exemption relating to four-unit dwellings contained in the pending amendment applies only to owners. It would not protect a person who was himself renting or leasing his home and taking in boarders. A person in this category would still be compelled to meet all the burdensome requirements of the act and throw open his

---

52. *Id.*; *see also* 40A AM. JUR. 2d *Hotels* § 6 (noting that in the case of boarding, lodging, or rooming houses, the proprietor deals with his or her customers individually concerning the terms and length of the accommodation and reserves the right to reject any or all applicants).

53. STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 43, at 1194.

54. 42 U.S.C. § 2000a(b)(1) (2006).

55. *Id.* § 3603(b)(2).

56. *Id.* This history offers a clue as to why the Mrs. Murphy exemption only protects owners: because the original boardinghouse version of Mrs. Murphy was virtually always going to be the owner of the property. It makes little sense for someone to operate a boardinghouse business out of a house they are only renting. Thus, when the exemption made the leap to the FHA, it was still aimed at protecting the "owner" of the property.

57. *See* City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731-32 (1995) (holding that the Fair Housing Act is a remedial civil rights statute that must be given a generous construction, therefore the exceptions thereto must be read narrowly).

private home to any one who wanted to move in with him.[58]

There is only one published federal case in which a roommate tried to claim the Mrs. Murphy exemption, and the court flatly denied the attempt.[59]

2. Even Mrs. Murphy Landlords Are Not Exempt from § 3604(c).—The only part of the statute from which Mrs. Murphy landlords are *not* exempt is § 3604(c).[60] As a result of this "non-exemption," even though a Mrs. Murphy landlord is allowed to discriminate against potential tenants, she cannot advertise her discriminatory preferences.[61] Although the legislative history is not clear as to why Congress singled out § 3604(c) in this manner, a number of courts have offered rationales for treating discriminatory statements differently.

The first, articulated in *Hunter*, is that the non-exemption prevents large-scale exclusionary effects that will be caused by discriminatory advertising.[62] The court reasoned that "seeing large numbers of 'white only' advertisements in one part of a city may deter nonwhites from venturing to seek homes there, even if other dwellings in the same area must be sold or rented on a nondiscriminatory basis."[63] Thus, ads taken out by people who are entitled to discriminate may have an additional market-narrowing effect on nearby properties whose owners are not so-entitled or inclined to discriminate.

Another reason for the non-exemption is to prevent the widespread misperception that housing discrimination is legal.[64] In all likelihood, the majority of people in America are not aware of the Mrs. Murphy exemption. If Mrs. Murphy landlords were allowed to place discriminatory ads in a newspaper,

---

58. 114 CONG. REC. 3345 (1968) (statement of Sen. Stennis).

59. *See* Marya v. Slakey, 190 F. Supp. 2d 95, 104 (D. Mass. 2001). In addition, other cases make clear that the Mrs. Murphy and other fair housing exemptions should not extend beyond the property's owner. *See, e.g.*, Singleton v. Gendason, 545 F.2d 1224, 1226 (9th Cir. 1976) (refusing to allow lessees to take advantage of another exemption in the FHA that is also reserved for owners); Guider v. Bauer, 865 F. Supp. 492, 495-96 (N.D. Ill. 1994) (holding that tenant of duplex who was daughter of owners and was in the process of purchasing duplex did not qualify as an "owner" for Mrs. Murphy purposes).

60. 42 U.S.C. § 3603(b) (2006) (stating that "nothing in section 3604 of this title (other than subsection (c)) shall apply" to Mrs. Murphy landlords). This regulation has been officially withdrawn, but is still relied upon for guidance.

61. United States v. Hunter, 459 F.2d 205, 213 (4th Cir. 1972) ("While the owner or landlord of an exempted dwelling is free to indulge his discriminatory preferences in selling or renting that dwelling, [he does not have] a right to publicize his intent to so discriminate.").

62. *Id.* at 213-14. It appears that the white man who took out the discriminatory advertisement in *Hunter* would have qualified for the Mrs. Murphy exemption. *Id.* at 213 n.10. Although the man still could have been liable for the § 3604(c) violation, there is no indication that he was ever sued for it.

63. *Id.* at 214; *see also* Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 249.

64. *See* Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 250 (noting that one of the purposes of § 3604(c) generally is to prevent people from believing that housing discrimination is an accepted norm); *see also* Spann v. Colonial Vill., Inc., 899 F.2d 24, 27-29 (D.C. Cir. 1990).

the average readers of that newspaper would most likely assume that both discriminatory advertising and housing discrimination in general, are not against the law. At the very least, the potential for mass confusion is significant.

A final argument for the non-exemption is that barring discriminatory statements can prevent the psychic harm that minority home seekers will experience from seeing discriminatory advertisements.[65] This concern is heightened by the fact that advertisements are usually placed in media where they will be viewed by large numbers of people. As the *Hunter* court noted, "[n]ewspapers have a far more widespread coverage than privately circulated advertisements, magnifying the . . . deleterious effect discriminatory advertisements might have on the congressional purpose" of the FHA.[66] The discriminatory advertisement is thus like a figurative door being slammed in the face of everyone from the protected category who views the ad.

II. THE CDA AND ITS CONFLICT WITH THE FHA

A. The CDA

In 1996, Congress passed the Telecommunications Act, Title V of which is known as the CDA.[67] The Act was intended to ensure that the then-nascent Internet could flourish as a forum for intellectual discourse, commerce, and information sharing without excessive government regulation.[68] In the year before the statute was enacted, the New York Supreme Court had ruled that Prodigy, a host of Internet message boards, was liable for comments that were written by third party users of the site.[69] The court determined that Prodigy's policy of screening out offensive content on its site constituted editorial control and thus made it akin to a newspaper publisher.[70] Because it was acting as a publisher, the court held that Prodigy could be liable for defamatory messages that were posted to its message boards.[71]

The ruling in *Prodigy* troubled lawmakers, who wanted to facilitate the free flow of ideas on the Internet but also wished to encourage website operators to

---

65. *See* HUD v. Schmid, Fair Hous.-Fair Lending Rptr. ¶ 25,139, at 26,149 (H.U.D. A.L.J. July 15, 1999), *available at* 1999 WL 521524 (finding that § 3604(c) "gives persons seeking housing the right to inquire about the availability of housing from a housing provider without having to endure the insult of discriminatory statements"); HUD v. Gruzdaitis, Fair Hous.-Fair Lending (P-H) ¶ 25,136, at 26,119 (H.U.D. A.L.J. Aug. 14, 1998), *available at* 1998 WL 482759 (same); *see also* Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 249-50.

66. *Hunter*, 459 F.2d at 215.

67. The Telecommunications Act, 47 U.S.C. § 230 (2006).

68. *Id.* § 230(b)(2).

69. Stratton Oakmont, Inc. v. Prodigy Serv. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. May 24, 1995), *overruled by statute*, 47 U.S.C. § 230.

70. *Id.* at *2. In fact, the court noted that Prodigy had compared itself to a newspaper in prior public statements, and had held out its exercise of editorial control over the comments as an advantage of the site. *Id.* at *3.

71. *Id.* at *7.

screen and filter offensive content, particularly pornographic or indecent material.[72] Thus, a provision entitled "'good Samaritan' blocking and screening of offensive material" was added to the CDA:

> (1) Treatment of publisher or speaker
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> (2) Civil liability
>
> No provider or user of an interactive computer service shall be held liable on account of—any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . . ; or—any action taken to enable or make available to information content providers or others the technical means to restrict access to material described [in the previous clause].[73]

Read as a whole, this provision would seem to create immunity only for those website operators who are taking steps to screen out offensive material.[74] If the first paragraph is taken in isolation, however, it accomplishes a much broader purpose: It exempts website operators from all publisher liability for the user-supplied content that they display. If this is the correct interpretation, then the CDA is squarely in conflict with the FHA's publisher liability provisions. There is no evidence that Congress was aware of this potential conflict when it passed the CDA.[75]

B. Cases Addressing the Conflict

1. Chicago Lawyers Committee for Civil Rights Under Law v. Craigslist, Inc.—Craigslist is a popular website that operates as a virtual bulletin board, featuring various discussion forums and classified advertisements for housing,

---

72. CONG. REC. H8469 (daily ed. Aug. 4, 1995).

73. 47 U.S.C. § 230(c) (2006).

74. At least once commentator advocates reading the statute in this manner. *See* Rachel Kurth, Note, *Striking a Balance Between Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. The Communications Decency Act*, 25 CARDOZO ARTS & ENT. L.J. 805, 834-35 (2007); *see also* Doe v. GTE Corp., 347 F.3d 655, 660-61 (7th Cir. 2003) (noting in dicta that a more sensible approach would be to immunize only those sites that attempt to block offensive or illegal material).

75. Jennifer C. Chang, Note, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969, 1002-03 (2002) (noting the "complete legislative silence as to the potential interaction between" the two statutes, and observing that the same Congress that passed the CDA also enacted fair housing legislation during the same session).

employment, goods and services, and personals, among other things.[76] The content of the postings is entirely user-supplied.[77] In 2006, the Chicago Lawyers' Committee for Civil Rights Under Law brought suit against Craigslist, alleging that it violated § 3604(c) of the FHA.[78] The complaint identified more than one hundred discriminatory housing advertisements that had been posted to the Chicago section of the site.[79] Craigslist moved for judgment on the pleadings, arguing that § 230(c) of the CDA gave it complete immunity for any cause of action related to third party content on its site.[80] The motion was granted, although for slightly different reasons than argued by the defense.[81] The District Court did not agree that the CDA grants immunity to all interactive computer services against all suits based on third party content. Rather, it found that the CDA only barred causes of action such as defamation, which require a finding that the defendant acted as the publisher of the third party content.[82] The court went on to find that § 3604(c), with its specific reference to publishing, was a clear example of such a cause of action.[83] The case was appealed to the Seventh Circuit, which affirmed the dismissal on these grounds.[84]

2. Fair Housing Council of San Fernando Valley v. Roommates.com.—In 2003, the Fair Housing Council of San Fernando Valley sued Roommates.com, an on-line roommate locator service.[85] The factual backdrop of this case was significantly different from *Craigslist*. Where Craigslist simply allows users to post ads to the site, Roommates uses a much more involved process. The site's users must first become members by creating a personal profile. The user creates

---

76. For background and general information about Craigslist, see craiglist/about > factsheet, http://www.craigslist.org/about/factsheet (last visited Mar. 26, 2010).

77. *Id.*

78. Complaint, Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. Feb. 3, 2006) (No. 06 C 0057), *available at* 2006 WL 344836.

79. *Id.*

80. 461 F. Supp. 2d 681, 682 (N.D. Ill. 2006), *aff'd*, 519 F.3d 666 (7th Cir. 2008).

81. *See id.* at 695-96.

82. *Id.* There are some situations in which a website operator might have non-publisher liability for the content on it site. For example, a website operator may be liable for contributory infringement if its system is designed to help people steal copyrighted material. *Id.* at 695 n.12; *cf.* Green v. Am. Online, 318 F.3d 465, 471 (3d Cir. 2003) (finding that a website operator not liable for allowing one user to send another a "punter" program through the site, which caused the second user's computer to shut down).

83. *Craigslist*, 461 F. Supp. 2d at 698.

84. 519 F.3d 666, 672 (7th Cir. 2008).

85. Fair Hous. Council of San Fernando Valley v. Roommate.Com, LLC, No. CV 03-09386PA (RZX), 2004 WL 3799488, at *1 (C.D. Cal. Sept. 30, 2004), *rev'd and remanded by* 489 F.3d 921 (9th Cir.), *reh'g en banc granted by* 506 F.3d 716 (2007), *on hearing, en banc* 521 F.3d 1157 (2008). There was some confusion about the proper name for the defendant in this case. Although the service's web address was www.Roommates.com, the company that operated the service was named Roommate.com, LLC. Although the court chose to refer to the defendant as Roommate, this Article will refer to it as Roommates.

the profile by selecting from a number of predetermined options provided by the site, including "age, gender, sexual orientation, occupation, and number of children."[86] The user does not have the option of leaving any of these blank.[87] If the user is listing a room for rent, he must also respond to prompts seeking information about the residence, current occupants of the household, and roommate preferences in terms of "age, gender, sexual orientation, . . . and familial status."[88] Roommates then uses this information to match people seeking housing with those who are offering it.[89] Users can also create nicknames, attach photographs, and write "free-form . . . 'comments'" to further describe themselves and their roommate preferences.[90]

The Fair Housing Council claimed that Roommates violated § 3604(c) and related state fair housing statutes in three ways.[91] First, the nicknames that some users selected for themselves contained descriptions based on race, ethnicity, gender, and religion.[92] Second, the free-form comments written by some users contained discriminatory statements. And third, the predetermined options on the profile questionnaire required users to provide information about protected characteristics about themselves and their preferred roommate.[93]

The case was originally dismissed on summary judgment, with the District Court ruling that the CDA gave Roommates complete immunity from suit.[94] The ruling was appealed to the Ninth Circuit,[95] which eventually heard the case en banc and handed down a more nuanced ruling.[96] The court found that the CDA did not provide immunity for Roommates under these circumstances. Specifically, Roommates was liable both for requiring users to answer questions about protected characteristics and for publishing the profiles containing this information.[97] The CDA offers no protection in situations like this because, by actively soliciting and shaping the content on the website: "Roommate becomes much more than a passive transmitter of information provided by others; it

---

86. *Id.* at *1.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at *2.

92. *Id.* Such nicknames included ChristianGrl, Latinpride, Asianpride, Whiteboy, and Blackguy. *Id.*

93. *Id.* at *2. Gender and familial status are protected characteristics under the federal FHA. 42 U.S.C. § 3604 (2006). California's state fair housing law, which also contains an advertising provision, protects these characteristics as well as sexual orientation. CAL. GOV'T CODE § 12955 (2005).

94. *Roommate.Com*, 2004 WL 3799488 at *6.

95. Fair Hous. Council of San Fernando Valley v. Roommates.com, 489 F.3d 921 (9th Cir.), *reh'g en banc granted by* 506 F.3d 716 (2007), *on reh'g en banc* 521 F.3d 1157 (2008).

96. Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008) (en banc).

97. *Id.* at 1175.

becomes the developer, at least in part, of that information. And section 230 provides immunity only if the interactive computer service does not 'creat[e] or develop[ ]' the information 'in whole or in part.'"[98]

The court also found Roommates liable because its matching system operated to "steer users based on" their identified protected characteristics.[99] Users were only sent listings from people with compatible preferences, and they were prevented from seeing listings for roommates that did not match their gender, sexual orientation, and familial status.[100] The liability here stemmed not so much from the user-supplied content but from the fact that Roommates used this information to restrict access to listings based on people's protected characteristics.[101] But the court did find that the CDA shielded Roommates from liability for the discriminatory statements that users posted in the "Additional Comments" field.[102] Like the ads posted to Craigslist, this portion of the user profile was entirely user-generated and free-form, and Roommates did not use it to match or screen the listings.[103]

III. IMMUNITY PULLS BACK THE CURTAIN ON DISCRIMINATORY ADS

As discussed previously, the recognition of publisher liability for discriminatory housing ads gave publishers the incentive to screen out such ads. Thus, after the early 1970s discriminatory housing ads largely vanished.[104] Today, however, the landscape has changed. The Internet's ease, ubiquity, and anonymity mean that anyone can post a housing ad whenever the urge strikes. At the same time, the immunity granted to website operators by the CDA and recognized in *Craigslist* and *Roommates* means that these ads are not screened or reviewed by anyone. The result is that discriminatory ads are appearing in cyberspace that would not have been seen in print fifteen years ago.

Although fair housing advocates understandably find this situation problematic, it is extremely useful from an informational standpoint. For the first time in a generation we can view the ads, unfiltered, and get answers to the following questions: How much discriminatory preference is still out there? What does it look like? What are the most common bases for discrimination? Who is expressing it?

The data in the following paragraphs are drawn from several sources, including the *Craigslist* and *Roommates* complaints, a recent nationwide NFHA

---

98. *Id.* at 1166 (quoting 47 U.S.C. § 2305(f)(3) (2006)).

99. *Id.* at 1167.

100. *Id.* The court differentiated the Roommates model from using an ordinary search engine. With a search engine, the user decides the search criteria. Even if the user runs a search based on discriminatory characteristics, the search itself is user-initiated and user-defined; the search engine itself is neutral. *Id.* at 1169-70.

101. *Id.*

102. *Id.* at 1172 n.33.

103. *Id.* at 1173-74. The appellate courts did not address the plaintiff's claims about the allegedly discriminatory screen names selected by the users.

104. 17 AM. JUR. 2D *Civil Rights* § 394 (2010).

study of discriminatory housing advertising,[105] and my own empirical analysis of 10,000 Craigslist advertisements from ten cities across the country ("the Ad Review").[106] Although this sample is not perfectly scientific, it gives a good picture of where the discriminatory ads are coming from and what they typically entail.

A. How Many Violations?

It is impossible to know with certainty how many discriminatory housing ads appear on the Internet in a given month or year. But all available evidence indicates that there are a great many. The NFHA Report identified more than 7500 discriminatory housing ads on websites serving all fifty states, including major metropolitan areas, smaller cities, and rural areas.[107] The NFHA Report does not say how many total ads were reviewed, meaning that it is not possible to garner from the NFHA Report what percentage of ads found on the Internet are discriminatory.

The Ad Review found 538 problematic advertisements in a total pool of 10,000, indicating that approximately 5.4% of all ads posted to Craigslist at any given time potentially violate the law.[108] Extrapolating total numbers from this is difficult because the Ad Review covered only ten cities, and it only included ads on Craigslist. But based on these numbers and given the enormous volume of ads on Craigslist and other websites, it is clear that there are a significant number of problematic and discriminatory ads appearing in cyberspace.

---

105. NAT'L FAIR HOUS. ALLIANCE, FOR RENT: NO KIDS! HOW INTERNET HOUSING ADVERTISEMENTS PERPETUATE DISCRIMINATION (2009), *available at* http://www.nationalfairhousing.org (follow "Fair Housing Resources" link, then follow "Reports and Research" link, then follow "Download" link in box titled "For Rent: No Kids!") [hereinafter NAT'L FAIR HOUS. ALLIANCE, FOR RENT: NO KIDS!]. In compiling this report, NFHA attorneys and cooperating member organizations reviewed thousands of housing ads posted to websites throughout the United States. *Id.* at 4.

106. I conducted my review as follows: I examined housing advertisements on Craigslist for ten major urban areas across the country: Atlanta, Boston, Chicago, Dallas, Denver, Las Vegas, Los Angeles, Minneapolis, New York City, and St. Louis. For each city, I reviewed 1000 ads—500 ads that appeared under the "Housing/Apartments" heading (which is for traditional rentals) and 500 ads that appeared under the "Rooms/Shares" heading (which is for roommates and shared living situations). Each block of 500 ads was reviewed in a single day to minimize the likelihood of repeat postings. I pulled any ad that potentially violated § 3604(c) of the FHA and categorized the offending language according to which protected category or categories it implicated. A detailed methodology can be found at *infra* Appendix.

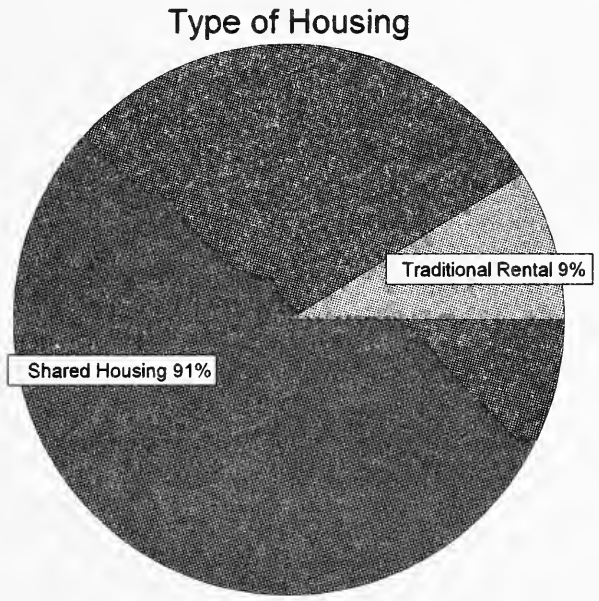
107. NAT'L FAIR HOUS. ALLIANCE, FOR RENT: NO KIDS!, *supra* note 105, at 4-5.

108. I describe the ads that I flagged in terms of "problematic language," "possible bias," and "potential violations" because, as discussed below, many of the ads that I flagged do not express an obvious discriminatory intent. The language is enough to raise a red flag under the HUD Guidelines, and it should be enough to have a complaint survive a motion to dismiss for failure to state a claim, but it would be up to a court to determine whether a particular ad satisfies the "ordinary reader" standard. *See* Ragin v. N.Y. Times Co., 923 F.2d 995, 1002 (2d Cir. 1991).

B. What Do the Discriminatory Housing Ads Look Like and Who Is Posting Them?

A qualitative analysis of the problematic advertisements reveals a number of interesting findings.

1. Ads for Roommates Are Far More Likely to Contain Problematic Language Than Ads for Traditional Rental Housing.—The vast majority of discriminatory housing ads are taken out by individuals seeking roommates or shared housing[109] as opposed to landlords seeking a traditional tenant. The Ad Review flagged 489 ads for shared housing but only forty-nine ads for traditional rental housing.[110] Thus, 91% of all problematic housing ads identified were ads seeking roommates.



Roommate ads are also likely to contain other detailed preferences or requirements that do not violate the FHA.[111] Some people express very specific

---

109. I use the term "shared housing" to mean the following: A situation in which two or more unrelated persons live together where each has some private space (usually a bedroom) while sharing common indoor areas such as kitchen, living, and dining rooms, and outside yard areas. The occupants freely interact with one another, collectively pay bills, and carry out a variety of day-to-day household maintenance chores and management tasks.

110. It is harder to draw conclusions from other studies on the breakdown between ads for roommates versus those for traditional rental housing. The NFHA Report fails to delineate what percentage of the ads it found were for roommates as opposed to traditional rental housing. Roommates.com, as its name implies, *only* features ads for shared housing. The *Craigslist* complaint does not specify which housing categories the various ads fell under. *See* Complaint, Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. 2006) (No. 06C 0657), 2006 WL 344836.

111. One of the more creative ads was part of the case against Roommates.com: "I am not looking for freaks, geeks, prostitutes (male or female), druggies, pet cobras, drama, black muslims

preferences about characteristics such as the political affiliation, diet preferences, sleep and hygiene habits, and social lives of their roommates.[112] They may seek a roommate who is "Harvard-affiliated,"[113] "comfortable with a clothing optional atmosphere,"[114] "health conscious and hip,"[115] "meticulously clean, very quiet [and] hard working,"[116] or who "likes cheap beer and throwing water balloons at people from our windows at 2am."[117] Such detailed descriptions of desired tenants do not appear in ads for traditional rental housing.[118]

2. The Most Common Basis for Discrimination—by Far—Is Familial Status.—One of the most dramatic findings is the bases for discrimination that the ads contain. Although the ads that discriminate based on race, religion, and ethnicity are perhaps the most jarring (and, not coincidentally, have received the most attention), they are extremely rare. The Ad Review found only thirty-eight ads that could be read as having a racial bias, thirty-two ads with a possible bias based on national origin, and twenty-nine ads with a possible religious bias, for a total of ninety-nine.[119] Thus, all of the ads that potentially discriminated on the

---

or mortgage brokers." Fair Hous. Council of San Fernando Valley v. Roommate.Com, LLC, No. CV 03-09386PA(RZX), 2004 WL 3799488, at *2 (C.D. Cal. Sept. 30, 2004), *rev'd and remanded by* 489 F.3d 921 (9th Cir.), *reh'g en banc granted by* 506 F.3d 716 (2007), *on hearing, en banc* 521 F.3d 1157 (2008). The statement of discrimination against black Muslims violates the FHA's prohibition against discrimination based on race and religion, but the other categories are not based on any protected characteristic. 42 U.S.C. § 3604(c) (2006). *See also* ad posted to Craigslist for a roommate in Minneapolis: "No bible thumpers, no bigots, no strung out meth addicts, no former presidents, no one over eight feet tall, no white-collar criminals." Minneapolis craiglist, Rooms & Shares, Oct. 22, 2009 (on file with author).

112. *See, e.g.*,"You should probably be a mature . . . health conscious individual . . . Preferably vegetarian . . . You should not be an extremist in any sense of the world as we attempt to live *in balance.*" Boston Craigslist, Rooms & Shares, June 9, 2009 (on file with author); "You are active and socialize outside the house . . . conservative about energy, . . . environmentally aware, . . . and either vegetarian or don't cook meat in the apartment. . . . Also it helps if you are a heavier sleeper." Boston Craiglist, Rooms & Shares, June 10, 2009 (on file with author).

113. Boston Craiglist, Rooms & Shares, June 8, 2009 (on file with author).

114. Boston Craiglist, Rooms & Shares, June 9, 2009 (on file with author).

115. Los Angeles Craigslist, Rooms & Shares, Oct. 9, 2009 (on file with author).

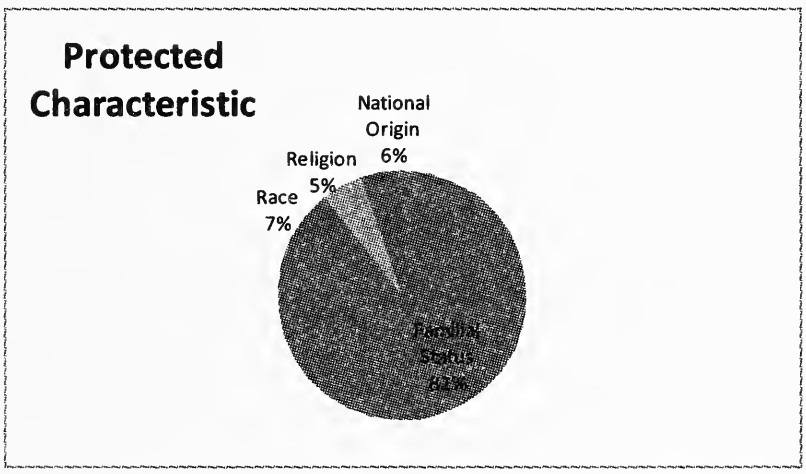
116. New York City Craigslist, Rooms & Shares, Oct. 30, 2009 (on file with author).

117. Chicago Craigslist, Rooms & Shares, Oct. 28, 2009 (on file with author).

118. The only specific characteristics mentioned in the ads for traditional rentals were for tenants who were professional and quiet.

119. Disability as a protected category is not dealt with in the Ad Review. There were virtually no ads of either housing type that could be read as discriminating against people with disabilities. There were only two ads that stated a dispreference for people with a history of alcohol or drug treatment. *See* Boston Craigslist, Rooms & Shares, June 9, 2009 (on file with author) ("NO drugs or AA"); Boston Craigslist, June 9, 2009 (on file with author) ("Individuals should . . . 'Not' have a history of alcohol and/or drug treatment or abuse"). Sex is not addressed either. As discussed *supra* note 42 and accompanying text, roommates are allowed to express preferences based on sex, and there were no ads for traditional rental housing that mentioned sex. Thus, the only protected

basis of race, religion, and national origin combined made up less than 1% of the sample. The most common basis for discrimination in all of the ads, for both roommates and traditional rental housing, is familial status. The Ad Review revealed 439 ads that potentially discriminated based on familial status, or close to 4.4% of the sample.[120] The NFHA Report found similar results, leading to the conclusion that "[t]he most common FHA violation that NFHA and its members found on the Internet was advertising discriminating against families with children."[121] Although not a formal analysis, it is telling that the *Craigslist* complaint cited four ads that discriminated based on race or color, compared with eighty-one ads that discriminated on the basis of familial status.[122]



When the variables for type of housing and basis for discrimination are put together, the differences between traditional rentals and shared housing become even more pronounced. In the Ad Review, all of the ads that expressed a racial or religious preference were roommate ads, as were virtually all of the ads mentioning national origin. Of the forty-nine problematic ads flagged for

---

characteristics that the Ad Review and this Article focus on are race, religion, national origin, and familial status.

120. This number may be an extremely conservative estimate. As described in the Appendix, I flagged ads by using the HUD Advertising Guidelines and § 3604(c) precedent as guides. Thus, in the absence of blatant statements like "no kids," I focused on particular buzz words like "mature," "retired," and "single." But the vast majority of the ads made clear that children were not living in the house and implied that children would not be welcome, without using this kind of loaded language. Many ads contained highly specific and detailed descriptions of the desired roommate, while failing to mention children. This raises a strong presumption that a person with a child would not be welcome. Although an argument could be made that these ads fail the ordinary reader test, without more I did not flag them. Without direct or indirect statements focusing on children, I believed the connection to familial status discrimination to be too attenuated. This is my taxonomy, however, and a court could reach a different conclusion.

121. NAT'L FAIR HOUS. ALLIANCE, FOR RENT: NO KIDS!, *supra* note 105, at 5.

122. *See* Complaint, Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. 2006) (No. 06C 0657), 2006 WL 344836.

traditional rental housing, forty-seven stated a preference based on familial status although only two potentially discriminated on the basis of national origin. Put another way, familial status was practically the only basis for discrimination in the ads for traditional rental housing.

3. The Statements Are Not Consistently Anti-Minority.—The type of discriminatory preference in the ads is also noteworthy. In 1968, supporters of the FHA and its advertising provisions were most likely concerned with remedying a situation in which the vast majority of discriminatory housing statements were anti-minority (specifically, anti-black).[123] Today the picture is much different. Simply put, the discrimination runs in all directions. To be sure, there are some "traditionally" discriminatory ads, for example: "NO MINORITIES"[124] and "African Americans and Arabians tend to clash with me so that won't work out."[125] There are others, however, that discriminate *in favor* of minority groups, such as: "Only Muslims apply,"[126] "Non- Women of Color NEED NOT APPLY,"[127] and "looking for gay latino."[128]

The Ad Review found that, overall, statements favoring minority groups (fifty-six) actually predominated over statements favoring majority groups (forty-one).

- **Race:** The thirty-eight ads were closely divided between pro-white and pro-minority: twenty favored whites, while seventeen favored non-whites (nine for blacks and eight for Asians).[129]
- **Religion:** Of the twenty-nine ads flagged for religion, most were pro-Christian or pro-religious generally, while a significant number either favored minority religions or expressed a bias against religion generally: Fifteen favored Christians, six favored Jews, one favored Mormons, one

---

123. *See, e.g.*, Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 223 n.162; *see also* Hearings on the Fair Hous. Act of 1967 before the Subcomm. on Hous. and Urban Affairs of the S. Comm. on Banking and Currency on S. 1358, S. 2114, and S. 2280 Relating to Civil Rights and Hous., 90th Cong. (1967), at 120 (statement of Roy Wilkins, Executive Director of the NAACP and Chairman of the Leadership Conference on Civil Rights: "There is nothing more humiliating to a father and a mother and two small children when he . . . wants to purchase a home, and somebody tells him you can't do it because you are black."); 114 CONG. REC. 5641 (1968) (remarks of Sen. Mondale: "I still believe that one of the basic and fundamental objections to discrimination in the sale or rental of housing is the fact that through public solicitation the Negro father, his wife and children are invited to go up to a home and thereafter to be insulted solely on the basis of race.")).

124. Complaint, ¶ 19, Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. 2006) (No. 06C 0657), 2006 WL 344836.

125. *Id.* ¶ 17.

126. *Id.* ¶ 40.

127. *Id.* ¶ 21.

128. *Id.* ¶ 24.

129. The remaining ad identified the neighborhood in which the housing was located as "white, puerto rican and mexican, some asian and black too." New York City Craigslist, Rooms & Shares, Oct. 30, 2009 (on file with author).

favored Buddhists, four expressed a general pro-religion preference, and two expressed a strong dispreference for religious people.

- **National Origin:** The thirty-two ads flagged for national origin were overwhelmingly in favor of particular national origin minority groups or foreigners generally: Twenty-six ads expressed a preference for "International" people, Hispanics, Europeans, or people from particular foreign countries, while only two expressed a preference for Americans or against foreigners.[130]

Familial status is a significant outlier here. The ads that mention familial status almost never express a bias in favor of families with children.[131]

4. Descriptions of the Person Who Placed the Ad Are More Common Than Preferences for a Particular Roommate Type.—The majority of ads that mention race, national origin, or religion do so not in terms of the preferred characteristics of the roommate, but rather as self-descriptions of the person taking out the ad or descriptions of the neighborhood in which the housing is located. Put another way, it is more common for a person to say "I am a white Christian male looking for a roommate" than "I am looking for a white Christian male roommate." In total, sixty-four of the problematic ads consisted of a self- or neighborhood description, while just thirty-two of the ads contained statements of preference about the prospective roommate.

- **Race:** Of the thirty-eight ads flagged for race, in twenty-seven the problematic language was a self-description of the person who placed the ad, one contained a description of the area, and only ten stated an overt preference for a roommate of a particular race.[132]

---

130. The remaining four ads identified the neighborhoods in which the housing was located using ethnic terms. New York City Craigslist, Rooms & Shares, Oct. 30, 2009 (on file with author) (describing neighborhood as "white, Puerto Rican and mexican, some asian and black too"); New York City Craigslist, Rooms & Shares, Oct. 30, 2009 (on file with author) ("Great neighborhood to practice your Spanish"); New York City Craigslist, Apts/Housing, Oct. 30, 2009 (on file with author) ("historically Irish" neighborhood with growing "Asian and Latino communities"); Dallas Craigslist, Rooms & Shares, September 2, 2009 (on file with author) (area is "mainly Mexican").

131. It is not clear whether, as a matter of statutory application, familial status discrimination could even "go both ways." The way the statute defines familial status—as one or more individuals under the age of eighteen being domiciled with a parent or guardian—seems to indicate that it only protects families with children, and not people who are discriminated against because they do not have children. *See* 42 U.S.C. § 3602(k) (2006). This interpretation would also be consistent with the legislative history of the FHA, which contains plenty of statements of concern about discrimination against families with children, and no mention of discrimination against people who do not have children. *See* 134 Cong. Rec. S19722-23 (1988) (remarks of Senator Karnes); sources cited *infra* notes 216-18. If this interpretation is correct, and there is no reason to doubt that it is, then familial status is different from race, religion, national origin, and sex, all of which protect anyone who is discriminated on these bases, regardless of their particular race, religion, national origin, or sex.

132. Two of these were an ad (which was posted twice) by a "white male" who sought to live with an "Asian female." charlesdragon@sbcglobal, Chicago Craigslist, Rooms & Shares, Oct. 27,

- **Religion:** Of the twenty-nine ads flagged for religion, seventeen consisted of self-identification, one contained a religious description of the neighborhood, and only eight stated an overt preference for a roommate with particular religious beliefs (or non-beliefs).[133]
- **National Origin:** Of the thirty-two ads flagged for national origin, fourteen contained self-descriptions, four contained neighborhood descriptions, and fourteen stated an overt preference for a roommate of a particular national origin.

As discussed previously, such self-descriptions and neighborhood descriptions can violate the FHA just as easily as an ad stating a preference for a particular type of roommate.[134]

It is worth noting that, of the race, religion, or ads that stated a preference for a particular type of roommate, almost none stated a dispreference for any particular group.[135] Put another way, while some ads stated "seeking Christian roommate," there were no ads which stated "no Jews." Obviously, stating a preference for one group implies a dispreference for the rest, and it violates the law just as a statement of dispreference would. Significantly, however, the sort of nasty and bigoted statements of dispreference identified in the *Craigslist* and *Roommates* cases were not found in the Ad Review.[136] Familial status is the exception. Many of the familial status ads were quite blatant in their dispreference for children.[137]

Finally, just as roommate ads are likely to include detailed descriptions of the person sought, they also likely contain a significant amount of information about the person who is taking out the ad. People often specify their age, profession, sexual orientation, eating habits, social activities, and hobbies. They may "LOVE bikes and beer . . and jamming out in our undies,"[138] or live by

---

2009 and Oct. 28, 2009 (both on file with author).

133. The remaining three contained vague statements of religiosity which could arguably be considered as describing the person placing the ad, but which I catalog separately because they do not directly self-identify. *See, e.g.*, Chicago Craigslist, Rooms & Shares, Oct. 29, 2009 (on file with author) ("God Bless"); Dallas Craigslist, Rooms & Shares, Sept. 3, 2009 (on file with author) (same); Atlanta Craigslist, Rooms & Shares, May 26, 2009 (on file with author) ("stay blessed").

134. *See, e.g.*, United States v. Hunter, 459 F.2d 205, 215 (4th Cir. 1972).

135. The only two ads to state a dispreference for a particular group were the two ads stating that overly-religious people would not be welcome.

136. One explanation might be the fact that the Ad Review only looked at a snap-shot of ads from a single one- to two-day period, whereas the plaintiffs in *Craigslist* and *Roommates* presumably searched many days or months worth of ads to come up with the most problematic. It might also be the case that the publicity from these cases, combined with the information-providing efforts that Craigslist has implemented since the lawsuit have resulted in greater awareness of the law. Therefore, fewer advertisers are willing to make blatantly bigoted statements.

137. One ad, for example, made clear just how negatively the poster viewed children when it stated: "No drugs, felons, or children." Dallas Craigslist, Rooms & Shares, Sept. 2, 2009 (on file with author).

138. Chicago Craigslist, Rooms & Shares, Oct. 28, 2009 (on file with author).

"Christian-based principles."[139] The ad may be placed by a "Jetta-driving Asian Jew,"[140] a "[q]ueer mom with a great view,"[141] or "three early twenty-something girls who love Costco, cooking, trying new vegetables, Glee and walking/running in the park."[142] Such extensive self-descriptions of the person placing the ad are not found in ads for traditional rental housing.[143]

IV. ASSESSING THE INFORMATION

What can we take from is information? Some preliminary conclusions can be made about the nature of on-line housing advertisements, which forms the basis for the policy recommendations in the next Part.

A. There Is a Qualitative Difference Between Roommate Ads and Ads for Traditional Rental Housing

The vast majority of potentially discriminatory ads are those for shared housing. Virtually all of the ads that mention the protected categories of race, religion, and national origin are roommate ads. Thus, to the extent that there is a problem of discriminatory advertising on the Internet, roommate ads are the primary culprit.

The most significant reason for this is the nature of the living situation between roommates. Roommates share intimate living spaces. They often establish social relationships with one another and forge a shared identity around their living arrangements. Many people seeking roommates are either seeking someone like themselves,[144] or someone who will be comfortable with them,[145] in ways that simply do not make sense in traditional landlord-tenant situations. As a result, roommate-seekers are much more likely to express detailed preferences about their desired roommates—both in terms of protected and non-protected characteristics—than landlords will about their tenants. Similarly, roommate ads frequently contain much more information about the person placing the ad than ads for traditional rental housing. In a very real way, ads for

---

139. Atlanta Craigslist, Rooms & Shares, May 26, 2009 (on file with author).

140. Los Angeles Craigslist, Rooms & Shares, Oct. 15, 2009 (on file with author).

141. Chicago Craigslist, Rooms & Shares, Oct. 28, 2009 (on file with author).

142. Chicago Craigslist, Rooms & Shares, Oct. 29, 2009 (on file with author).

143. None of the ads for traditional rental housing in the Ad Review contained any description of the person who placed the ad.

144. For example, one ad sought "a person whose personality matches mine." Boston Craigslist Rooms & Shares, June 10, 2009 (on file with author).

145. *See, e.g.*, Boston Craigslist, Rooms & Shares, June 8, 2009 (on file with author) ("MUST LIKE DOGS AND BRITISH PEOPLE"); Los Angeles Craigslist, Rooms & Shares, Oct. 15, 2009 (on file with author) ("We are both asian-american but that doesnt mean you need to be too. it does help though since you know those crazy asians like to cook strange looking things."); Dallas Craigslist, Rooms & Shares, Sept. 3, 2009 (on file with author) ("[O]ther renter also a christian but we are not bible toot en, scripture quot en people.").

roommates tend to resemble personal dating ads.[146] Personal dating ads almost always include the advertiser's gender and race. This practice is so routine that abbreviations like "WM" and "BF" are used instead of spelling out the words "White Male" or "Black Female."[147] A significant number of advertisers for roommates adopt these same abbreviations.[148]

Another reason why roommate ads are the primary culprits is that most roommate-seekers are renters as opposed to property owners or professional landlords. As such, they are less likely to know about the FHA and its requirements as they pertain to advertising.[149] Even if they are aware on some level that there are laws against housing discrimination, they may not realize that the law applies to them as roommate-seekers.[150] Roommate-seekers may

---

146. Some, in fact, seem to be an unsettling combination of the two. An ad posted to craigslist for shared housing in Dallas headlined "Seek Female/Woman Live in Companion" states that the housing is "OPEN TO ANY WOMAN . . . AS LONG AS YOU ARE ATTRACTIVE TO ME." Dallas Craigslist, Rooms & Shares, Sept. 3, 2009 (on file with author). Another posted to Craigslist for shared housing in Chicago has the headline "Free room in exchange for services" and states "Free for a woman, room and board in exchange for housework and other 'duties.' Must be female and single." Chicago Craigslist, Rooms & Shares, Oct. 29, 2009 (on file with author). A third, which was flagged because it specifies a racial preference, was posted by a man offering "Free Housing for Single Female." Dallas Craigslist, Rooms & Shares, Sept. 2, 2009 (on file with author). A fourth, which was flagged because it stated the race of the person taking out the ad, offered a "free place to stay for female w/benefits." Atlanta Craigslist, Rooms & Shares, May 26, 2009 (on file with author).

147. Lisa C. Ikemoto, *Male Fraud*, 3 J. GENDER, RACE & JUST. 511, 524 (2000).

148. Indeed, most of the ads in the Ad Review that were flagged for making a racial statement did so in this manner.

149. Although, as discussed *supra* note 78, landlords and property owners may not be terribly well informed about the law, either.

150. The level of ignorance about roommate liability under the FHA cannot be overstated. Although the bulk of the evidence for this proposition is anecdotal, it has been overwhelming. To begin, as discussed *infra* notes 153-54 and the accompanying text, academics who have published articles on the subject in law review articles have presented this aspect of the law incorrectly. Additionally, when I have presented this paper to law faculties, and described the topic to lawyers and law students, I have been uniformly met with surprise and disbelief that roommates are not allowed a say in who they live with and cannot advertise their preferences.

Finally, an unscientific observation that nevertheless speaks volumes: In 1992, a popular movie was released entitled SINGLE WHITE FEMALE (Columbia Pictures 1992), about a woman who advertises for the eponymous single white female roommate in the classifieds. The roommate she selects meets the stated racial and gender requirements, but turns out to be a murderous psychopath. *See* Single White Female (1992)—Plot Summary, http://www.imdb.com/title/tt0105414/plotsummary (last visited July 13, 2009). Such an ad clearly violates the FHA and no newspaper would have published it. *See supra* Part I.C. Obviously, the story is fictional and somewhat implausible. The fact, however, that an ad that articulated a racial preference was the central plot point in a major Hollywood movie—indeed, the ad copy is the *title* of the movie—without any controversy attached to the racial preference it articulated indicates a mass ignorance of the law.

mistakenly believe that they are covered by the Mrs. Murphy exemption, and they may not realize that even exempt landlords must abide by § 3604(c).[151] The law is complex and obscure enough that even academics get it wrong.[152] For example, a recent article about the *Roommates* case contains an entire section entitled "When Is It Lawful to Discriminate, But Not To Advertise That You Do? When You're Looking For A Roommate."[153] Another article on discrimination more generally states flatly in the second sentence: "We may decide on everything from our roommate to spouse, stating specifically that we are only interested in rooming with or marrying a person of a specific race, and that we choose to exclude all others."[154]

B. There Is a Difference Between Familial Status and Other Bases for Discrimination

Familial status discrimination is the clear outlier in a number of ways. Far more ads discriminate on the basis of familial status than for all of the other protected characteristics combined.[155] It is the only characteristic that is found in significant numbers in ads for traditional rental housing. Finally, the ads that mention familial status are consistently anti-child.

Put another way, if we were to take familial status discrimination out of the equation, there would be virtually no discriminatory ads for traditional rental housing, and relatively few for shared housing. Thus, to the extent that there is a problem with discriminatory housing advertisements, it is a problem with familial status discrimination.

V. USING THE INFORMATION

This data makes clear that discriminatory ads are overwhelmingly likely to be taken out by individuals seeking roommates, and they are far more likely to discriminate based on familial status than on any other protected category. Those ads that do mention race, ethnicity, or religion are likely to discriminate in all directions, and to consist of self-descriptions of the person taking out the ad.[156]

The film also may have exacerbated public ignorance of the law, as people who saw the movie (or even just the advertisements for the movie) could have been led to believe that such a housing advertisement was lawful.

151. *See supra* Part I.C.

152. *See supra* note 148.

153. Diane J. Klein & Charles Doskow, *Housingdiscrimination.com?: The Ninth Circuit (Mostly) Puts Out the Welcome Mat for Fair Housing Act Suits Against Roommate-Matching Websites*, 38 GOLDEN GATE U. L. REV. 329, 334 (2008). As discussed *infra* Part V.A, there are significant constitutional arguments in favor of allowing people to discriminate in their choice of roommates. The case law, however, has not supported this conclusion.

154. Kenneth L. Shropshire, *Private Race Consciousness*, 1996 DET. C.L. MICH. ST. U. L. REV. 629, 629-30.

155. *See supra* Part III.B.2.

156. *See supra* Part IV.

This information can and should inform any discussion of how to proceed. There are a number of interests and values at stake, some of which may conflict. On the one hand, it is important to prevent and remedy housing discrimination, which includes preventing discriminatory advertisements that may deter people from ever trying to procure particular housing. At the same time, it is important to safeguard the freedom of association and expression of individuals who share intimate living space, to eliminate confusion about the law, and to ensure opportunities and convenience to advertise and find housing for users of on-line sites.

A. Roommates Should Be Exempt

It is significant that the vast majority of ads that contain discriminatory statements are ads for roommates. First, it implies that a large number of people have no idea that the FHA applies to roommate advertisements. It also indicates that people perceive the roommate relationship differently than the relationship between landlord and tenant in a traditional rental situation. Put another way, there appears to be a social norm that the roommate relationship—just like one's choice of friends or intimates—is not one to which the concept of "discrimination" readily applies. This opens up the inquiry as to whether roommates should be covered by the FHA at all and whether the Mrs. Murphy exemption needs to be amended to include them.[157] There are a number of reasons why the exemption should be changed.

1. The Disconnect Between the Exemption's Purpose and Its Application.— The stated purpose of the Mrs. Murphy exemption—to protect the associational and privacy rights of people who share intimate living space[158]—fails to match up with the people it actually covers. It protects owners of small apartment buildings who live in separate units and have no meaningful interactions with their tenants, but it does not protect tenants who actually do share intimate living space. Although this poor fit has existed for as long as the Mrs. Murphy exemption, the problems it presents have become more salient now that (1) increasing numbers of people are living with roommates and housemates,[159] and (2) many are advertising for roommates and housemates on the Internet, and thus exposing themselves to prosecution for discrimination.

Bringing the exemption back to its original purpose of protecting the privacy and associational rights of people in shared living situations involves a relatively easy fix. Congress could amend the statute to expressly exempt individuals in shared living situations, regardless of whether they are owners or renters. Alternatively, HUD could issue a regulation specifying that individuals in shared

---

157. For a discussion of the Mrs. Murphy exemption, see *supra* Part I.C.

158. *See supra* note 48.

159. In 1990, the number of households that were comprised of roommate, housemates, or other groups of nonrelatives was roughly 2.5 million. In 2000, there were roughly 3.2 million such households, a 28% increase. FRANK HOBBS, U.S. CENSUS BUREAU, EXAMINING AMERICAN HOUSEHOLD COMPOSITION: 1990 & 2000, tbl. A-3, at 34 (2005), *available at* http://www.census.gov/prod/2005pubs/censr-24.pdf.

living arrangements may not to be prosecuted (much as HUD already provides protection for statements of sex-preference in shared housing[160]).

2. The Law's Protection of the Right of Intimate Association.—Looking to the original purpose of the Mrs. Murphy exemption is merely a first step, for it raises a deeper question about the validity of the privacy and associational rights argument in the first place. Rather than simply shifting the definition of who is permitted to discriminate, it is important to ask why anyone should be entitled to exclude people based on protected characteristics solely because of the intimacy of their living situation. In fact, whether privacy and associational rights should entitle people in shared living situations to discriminate has not been clearly settled, although a review of precedent finds significant support for the argument that they should.

The U.S. Supreme Court has not spoken clearly on the level of Constitutional protection appropriate for nonfamily members who choose to cohabitate. On one hand, decisions such as *Village of Belle Terre v. Boraas*[161] evince little sympathy for the associational rights of unrelated individuals to live together vis à vis the rights of families. There, the Court upheld a zoning ordinance that prohibited groups of unrelated individuals from living together.[162] Applying a rational basis standard of review, the Court found that the Village's stated goal of reducing congestion and providing a family-friendly environment for children was a sufficient state interest to justify the ordinance.[163]

The Court's decision elicited a strong dissent from Justice Marshall, who argued that:

> The choice of household companions—of whether a person's "intellectual and emotional needs" are best met by living with family, friends, professional associates, or others—involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protected by the Constitution.[164]

The *Belle Terre* decision has been widely criticized by commentators,[165] and

---

160. *See* HUD Regulation Regarding Fair Housing Advertising, § 10920(a)(5), *available at* http://www.hud.gov/offices/fheo/library/part109.pdf. This regulation has been officially withdrawn, but is still relied upon for guidance.

161. 416 U.S. 1 (1974).

162. *Id.* at 8-9. "Single family" zoning ordinances that limit housing in certain areas to people who are related by blood, marriage, or adoption remain commonplace today, although most contain an exception allowing for some number of unrelated people to live together as roommates. *See* ROBERT M. ANDERSON, AMERICAN LAW OF ZONING 3D § 9.30 (1986).

163. *Belle Terre*, 416 U.S. at 8-9.

164. *Id.* at 16 (Marshall, J., dissenting) (citations omitted).

165. *See, e.g.*, Robert J. Hartman, Village of Belle Terre v. Boraas*: Belle Terre is a Nice Place to Visit—But Only "Families" May Live There*, 8 URB. L. ANN. 193 (1974); Norman Williams, Jr. & Tatyana Doughty, *Studies in Legal Realism:* Mount Laurel, Belle Terre *and* Berman, 29 RUTGERS L. REV. 73, 76-82 (1975); Michael Alan Barcott, Note, Village of Belle Terre v. Boraas*:*

a number of state courts, under their respective state constitutions, have chosen to grant greater protection for the rights of unrelated people to live together.[166]

At the same time, the Court is reluctant to *force* associations on people in intimate settings. Although the family is still considered the most intimate relationship, and worthy of protection from government interference, the Court has indicated that other relationships deserve protection, too.

In *Roberts v. U.S. Jaycees*,[167] the Court noted that:

> [The Bill of Rights] must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. . . . Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.[168]

The *Roberts* Court suggests a methodology for determining whether a relationship is sufficiently intimate to warrant protection:

> Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities—such as a large business enterprise—seems remote from the concerns

---

"A Sanctuary for People," 9 U.S.F. L. REV. 391 (1974).

166. *See, e.g.*, City of Santa Barbara v. Adamson, 610 P.2d 436, 442 (Cal. 1980) (holding that a city ordinance that would prohibit more than five unrelated adults from living together was an invalid intrusion into life-style decisions); State v. Baker, 405 A.2d 368, 375 (N.J. 1979) (holding that city ordinance that would prohibit more than four unrelated people from living together violates Due Process); City of Des Plaines v. Trottner, 216 N.E.2d 116, 120 (Ill. 1966) (striking down ordinance that would prohibit more than two unrelated individuals from living together because it would "penetrate [too] deeply . . . into the internal composition of a single housekeeping unit").

The Supreme Court refused to extend *Belle Terre* further in *Moore v. City of East Cleveland, Ohio*, which dealt with a zoning ordinance that essentially forbade extended families from living together. 431 U.S. 494, 495-96 (1977) (plurality opinion). A plurality of the Court found that the zoning ordinance sliced too "deeply into the family itself" and intruded on private family living arrangements. *Id.* at 498-99.

167. 468 U.S. 609 (1984).

168. *Id.* at 618-19 (citations omitted).

> giving rise to this constitutional protection. . . .
>
> Between these poles, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. . . . [F]actors that may be relevant include size, purpose, policies, selectivity, [and] congeniality . . . .[169]

The relationship between roommates is sufficiently intimate to implicate protection from government interference under this criteria. Only a small number of people are involved in most roommate or shared housing situations. The decision about whom to room with is obviously highly selective and exclusive. Although it is true that one purpose of the relationship is financial, in the sense that roommates typically live together in order to share rent, the roommate relationship is quite different from a profit-making commercial venture.[170] The relationship is also very likely to be or become one of friendship, or at least companionship. Many roommate-seekers who posted to Craigslist were obviously hoping to find a like-minded person with whom they could share thoughts, experiences, and beliefs.[171] The relationship between roommates is similar in some ways to a romantic relationship. This explains why many roommate ads resemble personal dating ads, down to the familiar abbreviations for race, gender, and ethnicity. It is settled that people are permitted to discriminate in terms of race, ethnicity, and religion in their choice of romantic partners.[172] Even if two roommates dislike one another, the interaction between people who share living space is distinctly personal. Given the almost sacred position that the home occupies in American law and culture, it follows that living arrangements should be given more freedom from government regulation

---

169. *Id.* at 619-20 (citations omitted).

170. Messerly, *supra* note 48, at 1976 ("Economically speaking, it is safe to assume that most people looking for roommates do not anticipate making a profit but rather defraying their own living costs or perhaps attempting to live in dwellings that they otherwise could not afford.").

171. *Id.* at 1978 ("[T]he roommate-housemate relationship has the potential to become a deep, intimate relationship where mutual support, companionship, and trust play integral parts.").

172. A few commentators have pointed out that having and expressing overt racial preferences about romantic partners can be harmful, even as they recognize that the law cannot interfere with such intimate personal decisions. *See* Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1310 (2009) (arguing that intimate discrimination can limit opportunities for other types of affiliation); Matt Zwolinski, *Why Not Regulate Private Discrimination?*, 43 SAN DIEGO L. REV. 1043 (2006); Note, *Racial Steering in the Romantic Marketplace*, 107 HARV. L. REV. 877, 883-84, 889 (1994) (arguing that racial signifiers in personals ads lead to "stigmatic injury" and serve as an impediment to an integrated society).

than other less intimate forms of association.[173]

Scholarly opinion weighs in favor of recognizing that people have a constitutionally recognized right against state interference in their choice of roommates. Professor Kenneth L. Karst argues, for example, that "[m]easured against the freedom of intimate association, any governmental intrusion on personal choice of living arrangements demands substantial justification, in proportion to its likely influence in forcing people out of one form of intimate association and into another."[174] In light of this discussion, shared living situations are sufficiently personal and intimate to implicate constitutional protection from interference by the state, even when interference by the state takes the form of antidiscrimination laws.[175] Thus, individuals should be

---

173. *See, e.g.*, Bell v. Maryland, 378 U.S. 226, 313 (1964) ("Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home . . . to any person . . . solely on the basis of personal prejudices . . . ."); Ravin v. State, 537 P.2d 494, 503 (Alaska 1975) ("If there is any area of human activity to which a right to privacy pertains more than any other, it is the home.").

174. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 687 (1980). *See id.* at 692 ("The freedom to choose our intimates and to govern our day-to-day relations with them is more than an opportunity for the pleasures of self-expression; it is the foundation for the one responsibility among all others that most clearly defines our humanity."); *see also* Messerly, *supra* note 48, at 1978 ("It is essential for our society to continue to recognize the principles of liberty that form the basis of the right to choice in shared living . . . .").

175. An interesting line of state cases deals with a different but related issue: whether a landlord's freedom of religion should trump housing discrimination statutes. In these cases, a landlord cites religious objections to renting to same-sex couples or to unmarried heterosexual couples. (Because neither sexual orientation nor marital status is a protected category under the federal FHA, such cases only arise in states whose fair housing statutes cover those categories.) The courts have come out differently on whether religious rights should prevail in these situations. *Compare* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 931 (Cal. 1996) (enforcing a state law prohibiting marital status discrimination against landlord did not violate her religious freedom under the state or federal constitutions) *and* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 278 (Alaska 1994) (holding that "[b]ecause [the landlord] would have rented the properties to the couples had they been married, and he refused to rent the property only after he learned they were not, [the landlord] unlawfully discriminated on the basis of marital status"), *with* State *ex rel.* Cooper v. French, 460 N.W.2d 2, 11 (Minn. 1990) (holding that enforcing a state law prohibiting marital status discrimination violated landlord's religious liberty under the state constitution and conflicted with a state law that outlawed fornication). Although these cases are instructive as examples of the types of analyses that come into play when housing discrimination laws run up against other Constitutional protections, they are of limited usefulness to this Article because they do not deal with shared living and privacy rights. They are also likely to depend on vagaries of state law, such as whether a particular state has a statute criminalizing the protected behavior, or how broadly the religious liberty clause in the state's constitution is interpreted. For a more thorough discussion of this line of cases, see Stephanie Hammond Knutson, Note, *The Religious Landlord and the Conflict Between Free Exercise Rights and Housing Discrimination Laws—Which Interest Prevails?*, 47 HASTINGS L.J. 1669 (1996).

permitted to select with whom they live, and should be permitted to discriminate in this selection using whatever criteria they wish.

One could argue that, given such existing support in the case law, any roommate who is sued for violating the FHA need only assert a privacy or associational rights defense. The lack of direct precedent on the issue, however, makes this tactic potentially risky. There have been only three reported cases in which roommates have been accused of violating fair housing laws. In *Marya v. Slakey*,[176] the only federal case to address this issue, the defendant roommate moved for summary judgment, arguing that she should fall under the Mrs. Murphy exemption.[177] The court denied the motion, narrowly construing the exemption to apply only to property owners.[178] The defendant did not raise the constitutional defense. In *Department of Fair Employment & Housing v. DeSantis*,[179] an administrative hearing officer determined that a woman could be liable under a state fair housing statute for refusing to allow an African-American man to be her roommate and for making statements to that effect.[180] Again, no constitutional defenses were raised. *State ex rel. Sprague v. City of Madison*[181] is the only case in which roommates raised a constitutional defense based on privacy and associational rights to the application of a fair housing law (in this case, a municipal fair housing ordinance).[182] The court rejected the argument with little analysis, stating simply that the roommates "gave up their unqualified right to such constitutional protection when they rented housing for profit."[183]

In contrast, in *Seniors Civil Liberties Ass'n v. Kemp*,[184] the Eleventh Circuit made a strong statement (albeit in dicta) that privacy and associational rights might trump antidiscrimination laws when it comes to shared housing.[185] The individual plaintiffs in *Seniors* were two elderly residents of a condominium complex that prior to the Act's amendment had prohibited children under the age of sixteen from living in the complex. The plaintiffs argued that, by forcing their

---

176. 190 F. Supp. 2d 95 (D. Mass. 2001).

177. *Id.* at 100.

178. *Id.* at 104.

179. Nos. H 9900 Q-0328-00-h, C 00-01-180, 02-12, 2002 WL 1313078 (Cal. F.E.H.C. May 7, 2002).

180. *Id.* at *5. Ultimately, the hearing officer determined that only the allegation related to the discriminatory statement was proven, and so the defendant was not found liable for the denial of housing.

181. 555 N.W.2d 409, 1996 WL 544099 (Wis. Ct. App. Sept. 26, 1996) (unpublished table decision).

182. *Id.* at *3.

183. *Id.* This reasoning is somewhat suspect. As noted by Messerly, most people who live with roommates are not renting housing for "a profit," but rather sharing expenses with someone so they can both afford to live in a particular place. *See* Messerly, *supra* note 48, at 1976. One could draw an analogy to two people who carpool and split the cost of the gas. It would not make sense to describe either of these people as operating a taxi service for profit.

184. 965 F.2d 1030 (11th Cir. 1992).

185. *See id.*

complex to allow children as residents, the Act unconstitutionally violated their right of privacy and freedom of association.[186] The court rejected the privacy argument precisely because the case did not involve an intimate living situation: "If the Act were trying to force plaintiffs to take children into their home, this argument might have some merit. But the Act violates no privacy rights because it stops at the [plaintiffs'] front door."[187] The court denied the plaintiffs' free association argument by concluding that the plaintiffs had not shown that their condominium complex met the criteria set forth in *Roberts* for constitutional protection.[188]

Although an honest application of the *Roberts* analysis would extend protection to the roommate relationship, the case law is less than clear. A legislative solution is preferable to the uncertainty of forcing roommates to be sued and then asserting a substantive due process defense. Thus, the Mrs. Murphy provision should be amended to cover shared housing. In the alternative, HUD could amend its regulations to make clear that roommates are not subject to the FHA at all (as opposed to the regulation, now withdrawn but looked to as guidance, which allows roommates to discriminate only on the basis of sex).

3. Norm Theory Supports Exempting Roommates.—Norm theory, with its focus on real world behaviors and how these intersect with the functions of law, can also inform this discussion. As norm scholars have observed, the interplay between laws and social norms is a variable one: at times a norm will operate in opposition to a law, at times a law and a norm will work together to influence people's behavior, and at times the two will influence one another.[189] In order to determine whether the law should ignore, strengthen, or undermine a social norm, we must look to a variety of factors, including the desirability of the behavior that the norm encourages, whether there is a consensus on what proper conduct would be, and the effectiveness of government action to bring about change.[190] On the question of whether roommates should be covered by the FHA, these factors mitigate in favor of exemption.

In this case we have a norm—that roommates be permitted to consider any characteristics they deem important when evaluating a potential roommate—in conflict with a law that prohibits roommates from discriminating on the basis of

---

186. *Id.* at 1036 ("'If the right of . . . privacy protects the decisions concerning the begetting and rearing of children, then the decision not to have children around must be afforded the same protection.'") (quoting plaintiff's brief).

187. *Id.*

188. *Id.*

189. *See* Richard H. McAdams, *The Origin, Development, and Regulations of Norms*, 96 MICH. L. REV. 338, 347 (1997).

190. *See generally* Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947 (1997) (outlining a comprehensive theory of social norms and government action which incorporates considerations of economic efficiency, morality, and the efficacy both of the norm and of state intervention); *see also* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 953-67 (1996) [hereinafter Sunstein, *Social Norms and Social Roles*] (setting forth five grounds for governmental efforts to alter social norms).

certain protected characteristics. State interference is certainly appropriate to deter harmful conduct such as racial subordination, the perpetuation of status-based inequality, or the operation of an unjust caste system.[191] Such conduct reduces individual autonomy, diminishes the dignity and respect that people deserve, and constitutes a failure of the market.[192] However, it is not at all clear that the social norm at issue here leads to inequality, subordination, or a caste system. Recall that, with respect to race, religion, and national origin, the preferences go in all directions, and are just as likely to be expressed by minority groups members in favor of other minorities as they are by majority group members.

Regardless of whether a particular group is harmed more than another by a social norm, it may still be important for the law to express society's disapproval of that norm.[193] The FHA clearly expresses the view that race, religion, and national origin have no place at all in decisions about housing, no matter who is the target. Most people endorse this view.[194] Yet at the same time, a significant number of people believe that a person should have complete discretion when it comes to deciding who to share intimate space with and they would be disturbed at state interference with this choice. One can see why religion and national origin might be significant in a particular roommate relationship for reasons that have nothing to do with animosity toward a particular group, for example where a Jewish person insists on a roommate who will keep kosher or where a person of Chinese descent wishes to have a roommate with whom she can speak Mandarin or Cantonese. And while we might like to think that race has no place in the roommate relationship, the reality is that for some people it does.[195] Thus,

---

191. *See* Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1074-82 (1995) (explaining why, from a normative perspective, legal intervention is necessary to counteract racial discrimination and subordination); Sunstein, *Social Norms and Social Roles*, *supra* note 190, at 962-64 (discussing how law should counteract caste systems); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2043-44 (1996) [hereinafter Sunstein, *On the Expressive Function of Law*] (describing the necessity of collective action when the prevailing norm leads to inequality).

192. *See* Sunstein, *Social Norms and Social Roles*, *supra* note 190, at 962-63 (describing how a caste system interferes with autonomy and well-being); Sunstein, *On the Expressive Function of Law*, *supra* note 191, at 2044 (discussing how inequality erodes dignity); McAdams, *supra* note 191, at 1074-82 (arguing that racial discrimination leads to market failure).

193. *See generally* Sunstein, *On the Expressive Function of Law*, *supra* note 191.

194. *See* MARTIN D. ABRAVANEL & MARY K. CUNNINGHAM, U.S. DEP'T OF HOUS. & URBAN DEV., HOW MUCH DO WE KNOW? PUBLIC AWARENESS OF THE NATION'S FAIR HOUSING LAWS 13, 18 (2002).

195. For example, studies reveal that randomly paired college roommates of different races were significantly more likely to break up than roommates of the same race, depending on how difficult it was to terminate housing arrangements on a particular campus. Tamara Towles-Schwen & Russell H. Fazio, *Automatically Activated Racial Attitudes as Predictors of the Success of Interracial Roommate Relationships*, 42 J. EXPERIMENTAL SOC. PSYCH. 698, 701 (2006); Natalie J. Shook & Russell H. Fazio, *Roommate Relationships: A Comparison of Interracial and Same-*

we can support the expression of non-discrimination in housing while simultaneously disagreeing with the effect of applying the FHA to roommates. Under Cass Sunstein's seminal formulation, support for the statement that the law makes must be rooted in judgments about the law's consequences.[196] If the effect of a law seems bad or ambiguous even to that law's supporters, we should rethink whether this is an appropriate application. Here, while it is appropriate to retain the FHA's basic statement against nondiscrimination in housing, it is also necessary to carve out an exemption to avoid consequences that few would accept.

There are a few other circumstances under which norm scholars contend that government interference with social norms is inappropriate. First, state action should be avoided where the action would invade an individual's rights (as opposed to merely interfering with preferences or choices).[197] As discussed previously, a strong argument can be made that people have privacy and associational rights in deciding with whom they wish to live.

State action should also be eschewed where it would be futile or counterproductive.[198] Policing roommate decisions would be extremely difficult, to say the least. Craigslist and other websites notwithstanding, many roommate relationships are formed without any sort of public advertising, as when friends and acquaintances simply decide to live together. Even if a person chooses to advertise for a roommate on-line, the transaction is almost certainly a "one-off"—a situation not likely to repeated with any regularity and therefore not amenable to the type of investigation and testing that would ferret out discrimination by an apartment complex or real estate broker. In the absence of an express discriminatory statement by the roommate-seeker, and given the myriad non-protected characteristics that people commonly take into consideration when selecting a roommate, it would be practically impossible to prove that he or she is engaging in impermissible discrimination.

Of greater concern, however, is the fact that applying the FHA to roommates is likely to cause a counterproductive backlash.[199] People who would generally support the antidiscrimination goals of the FHA may well be offended at the thought of the state interfering with their decision with whom to share intimate

---

Race Living Situations, 11 GROUP PROC. & INTERGROUP REL. 425, 429 (2008). The studies also found that racially heterogeneous roommates tended to spend less time together and to be less involved with each other's friends. Towles-Schwen & Fazio, *supra*, at 700.

196. *See* Sunstein, *On the Expressive Function of Law*, *supra* note 191.

197. *Id.* at 2049; Sunstein, *Social Norms and Social Roles*, *supra* note 190.

198. Sunstein, *On the Expressive Function of Law*, *supra* note 191, at 2049; Sunstein, *Social Norms and Social Roles*, *supra* note 190, at 965.

199. Linda Hamilton Krieger notes that backlash is likely to occur when a transformative legal regime (such as a civil rights law) "generates outcomes that diverge too sharply from entrenched norms and institutions to which influential segments of the relevant population retain strong, conscious allegiance." *Afterward: Socio-Legal Backlash*, 21 BERK. J. EMP. & LAB L. 476, 477 (2000).

living space.[200] The potential for backlash is even greater when we consider who would be affected: individuals who are not engaged in profit-making activity, who likely have limited means in the first place (hence their need to look for a roommate to defray living expenses), and who are of all races, religions, and ethnicities. The specter of the FHA being applied to prevent ordinary people from exercising control over an intimate aspect of their lives would lend support to the opponents of civil rights laws, who often seek portray them as unduly interfering with individual autonomy. The fact that the targets would be people of all races, religions, and ethnicities, many of whom are not obviously acting out of animus toward other groups but rather an affinity for their own, would only worsen this effect.

B. Only Roommates Should Be Exempt

The discussion above, with its emphasis on the high degree of intimacy involved in shared living situations, leads to another conclusion: People who do not share intimate living space should not be exempt from the Act. Although this argument does not necessarily stem from the current situation with online advertising, it is the logical next step in the reexamination of the Mrs. Murphy exemption.[201]

The boarding house-operator version of Mrs. Murphy found in Title II of the Civil Rights Act of 1964 rented out "rooms" within a "building."[202] As discussed previously, concerns for this Mrs. Murphy's privacy and associational rights were paramount because she was essentially sharing her home with transient strangers.[203] Title II exempted her from coverage, thus allowing her to discriminate against anyone she did not feel comfortable living with for any reason.[204]

In 1968, Mrs. Murphy reappeared in the FHA as a landlord who rented out "rooms *or units*" in a "dwelling[] containing living quarters . . . intended to be occupied by no more than four families *living independently of each other*."[205] Although this could describe a simple homeowner who rents out rooms in her house, it could just as easily describe someone who owns a four-unit apartment building in which each unit is a completely separate apartment with its own entrance, kitchen, bathroom, and living space.[206] The occupants of this building

---

200. *See id.* at 520 (cautioning that if "well-meaning and thoughtful" people are likely to resist the application of law to a norm, then backlash is likely to result).

201. *See supra* notes 43-68 and accompanying text.

202. 42 U.S.C. § 2000a(b)(1) (2006).

203. *See supra* notes 48, 51-53 and accompanying text.

204. *See supra* note 54 and accompanying text.

205. 42 U.S.C. § 3603(b)(2) (2006) (emphasis added).

206. It is also just as likely. In 2000, about 1.3 million households contained "roomers" or "boarders." HOBBS, *supra* note 159, tbl. 1, at 5. According to a HUD survey in the mid-1990s, just over 1.1 million rental units were located in buildings with two to four units with a resident owner. HOUS. & HOUSEHOLD ECON. STATS. DIV., U.S. CENSUS BUREAU, PROPERTY OWNERS & MANAGERS SURVEY tbl. 108 (1995), *available at* http://www.census.gov/housing/poms/mt108.txt.

are unlikely to see one another except in passing in the hallways. This version of Mrs. Murphy is less likely to share any space—much less intimate living space—with her tenants, and therefore her associational rights and privacy are no longer implicated. Although the rationale for the exemption is the protection of privacy and associational rights, many of the people covered by this exemption do not share intimate living space with their tenants in any meaningful way. This has long rankled fair housing advocates, who see the Mrs. Murphy exemption as little more than a license for small landlords to discriminate for no good reason.[207]

There are other more practical benefits in realigning the Mrs. Murphy exemption to cover only shared housing: This change would make the law less complicated and easier for the layperson to understand. The definitional boundary between shared living and all other types of housing is a much easier one for people to grasp than the current, somewhat arbitrary, line drawn at owner-occupied buildings containing four units or less. Drawing the line at shared housing also makes it easier to tell from the outset who is exempted and who is not. An advertisement for a roommate will virtually always make clear that shared living is involved. In fact, "rooms/shared" and "apts/housing" are separate categories on Craigslist.[208] In contrast, it is impossible to tell from an advertisement whether the housing is covered by the current Mrs. Murphy exemption or not. It might not even be obvious upon inspection of the property, if the owner fails to mention that she also lives in the building.

C. Exempt Roommates Should Also Be Exempt from § 3604(c)

If the Mrs. Murphy exemption is realigned to cover only people in shared living situations, then such individuals should also be exempt from § 3604(c). There are a number of reasons for this, some practical and some legal, although there are also some very legitimate concerns with this approach.

1. Arguments in Favor of Exempting Roommates from § 3604(c).—As a practical matter, exempting roommates from all portions of the FHA is more efficient for everyone involved. The Mrs. Murphy non-exemption as it currently exists has been criticized because it creates a situation in which Mrs. Murphy is free to discriminate against particular prospective tenants but is prohibited from warning them ahead of time that their efforts to rent from her will be futile. This wastes the time and energy of both parties.[209] Although it would undoubtedly be upsetting for minority home-seekers to confront biased advertisements, it may ultimately be *more* discouraging if they continually go to the trouble of

---

207. *See, e.g.*, Walsh, *supra* note 43, at 613 (noting that the intimacy rationale is weakened by "the physical separation" of the owner from the renters).

208. *See, e.g.*, Craigslist, http://newyork.craigslist.org.

209. Messerly, *supra* note 48, at 1975-76. As the white man who took out the discriminatory classified ad in *Hunter* explained, "It's really a kindness to colored people. There's no use making them . . . come here when I'm not going to rent to them." United States v. Hunt, 459 F.2d 205, 215 (4th Cir. 1972).

attempting to secure housing only to be turned down for unknown reasons.[210] If people were free to advertise their preferences, the argument goes, at least homeseekers would know whom to call and with whom not to bother.

There is also something a little backward about a regime in which particular conduct is permitted, but statements of intent to commit that conduct are not. To pick up on the metaphor used earlier: The § 3604(c) non-exemption means that Mrs. Murphy cannot *figuratively* slam the door in a minority homeseeker's face through a discriminatory advertisement, but she is free to *literally* slam the door in his face when he appears in person attempting to rent from her—so long as she does not tell him why.

Including § 3604(c) in the exemption also eliminates the potential First Amendment[211] problems created by the current system, particularly with respect to ads that discriminate based on familial status. As discussed above, commercial speech can be regulated if it is misleading or if it concerns an unlawful activity.[212] Because housing discrimination is illegal, under the commercial speech doctrine, housing advertisements that contain discriminatory preferences can be banned. This is not necessarily the case, however, for a landlord who is exempt from the other provisions of the FHA. Although other civil rights statutes prohibit housing discrimination when it is based upon race, religion, or national origin,[213] there are no additional federal laws that prohibit housing discrimination when it is based upon gender or familial status, and there are limited protections against disability discrimination in the private housing market. In the absence of any state law containing such a prohibition, an exempt landlord is completely free to discriminate on these bases, and an ad describing his preferences therefore does not involve any illegal conduct. Nor does such an ad incorrectly imply that he can discriminate based on particular protected characteristics—because, in fact, he can.[214] Although there have been cases in

---

210. Of course, this can—and does—happen even with non-Mrs. Murphy landlords. The difference, however, is that when non-exempt landlords discriminate, they are violating the FHA, whereas Mrs. Murphy is not.

211. U.S. CONST. amend. I.

212. *See supra* notes 38-41 and accompanying text.

213. By its terms, the Civil Rights Act of 1866 prohibits racial discrimination in the making of contracts, 42 U.S.C. § 1981 (2006), and racial discrimination in the sale or rental of property, *id.* § 1982, both of which are relevant to the rental transaction. The Supreme Court has interpreted these prohibitions to extend to discrimination based on national origin and religion as well because at the time these statutes were passed people from certain religious groups or geographically distinct areas were commonly considered to be of different "races". *See* Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987) (holding that "Jews" were considered a distinct race at the time of passage of § 1982); Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610-13 (1987) (holding that "Arabs" were considered a distinct race at the time of passage of § 1981).

214. *See* Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 278. In a situation like this, where the speech is neither unlawful nor misleading, the speech restriction would be put through additional tests as set forth in *Central Hudson*. Specifically, a court would ask whether (1) the government interest in the regulation is substantial; (2) the regulation directly advances the

which exempt landlords have been found liable for violating § 3604(c) based on familial status discrimination not otherwise prohibited by law, none deals with this obvious First Amendment problem.[215] The *Craigslist* court pointedly noted, in dicta, that "any rule that forbids truthful advertising of a transaction that would be substantively lawful encounters serious problems under the first amendment."[216]

It is not even clear, however, that the commercial speech doctrine should apply to roommate ads. As discussed above, although there may be some economic aspect to the roommate relationship, strictly speaking, it is not a commercial or profit-making enterprise.[217] Many of the ads bear very little resemblance to advertisements for traditional rental housing, and indeed, do not look much like commercial advertisements at all. While ads for traditional rental housing focus on describing the attributes of the housing, people often use roommate ads as a platform to make a statement about who they are,[218] what the acceptable norms and behaviors of their households are, how they structure their lives, and the values they would like to share with a roommate.[219] The ads are quirky, confessional, sometimes funny, and often quite earnest, reading more like personal statement essays.[220] Without the commercial speech doctrine, restrictions on the ability to advertise for roommates are even more difficult to justify from a First Amendment perspective.

Eliminating the § 3604(c) non-exemption will also do away with the

---

government's asserted interest; and (3) the regulation is no more extensive than necessary to serve the government's interest. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980). Even if the government interest in combating the effects of discriminatory advertising is considered substantial, it would be difficult to satisfy the second and third prongs of the test in cases where the underlying behavior is legal. *See* Schwemm, *Discriminatory Housing Statements*, *supra* note 17, at 280-82.

215. *See, e.g.*, HUD v. Schmid, Fair Hous. Fair Lending Rptr. ¶ 25,139 at 26,149 (HUD ALJ July 15, 1999) (finding familial status discrimination when a landlord stated, "this apartment has a pool, so we don't want children or pets"); HUD v. Dellipaoli, Fair Hous.-Fair Lending Rptr. ¶ 25,127 (HUD ALJ Jan. 7, 1997) (finding familial status discrimination when owner of two-family dwelling told a prospective renter that teenagers were prohibited from renting out the upstairs unit).

216. Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668 (7th Cir. 2008).

217. Indeed, the Ad Review revealed a small but significant number of ads that sought a roommate purely for companionship—either romantic or platonic. These ads made clear that the roommates' share of the rent would be free or a nominal amount.

218. *See supra* text accompanying notes 131-42.

219. *See supra* note 174 and accompanying text.

220. The medium undoubtedly also contributes to the tone of the ads. Because the ads are posted without editing or review, the people who post them may come to view them like blog postings or comments to a discussion forum, in which a less formal, more conversational tone is used than one would find in newspaper classifieds. The fact that users of Craigslist and similar sites are not usually charged a fee (compared with advertisers in print media, who typically must pay per line or per character) likely also contributes to the chatty, effusive nature of the ads.

confusion that it creates. The fact that an exempt landlord can discriminate but not advertise discriminatory preferences is difficult for many to grasp. A significant number of the questions and comments posted to Craigslist's "Fair Housing Forum" concern this issue.[221] It is clear from reading these comments that the misconception that Mrs. Murphy landlords are entirely exempt from the FHA is extremely common.[222]

To summarize, allowing roommates to advertise their discriminatory preferences has several advantages: 1) It eliminates the inefficiencies that the non-exemption creates; 2) it protects the First Amendment rights of roommate-seekers both to engage in commercial speech that does not concern unlawful activity and to engage in expressive speech about the sort of people with whom they wish to form a household; and 3) it will reduce a good deal of the persistent confusion that exists due to the disconnect between allowing covered individuals to discriminate while preventing them from expressing their discriminatory preferences.

2. Arguments Against Exempting Roommates from § 3604(c).—The biggest problem with this approach is that it would permit some discriminatory housing statements for the first time since the passage of the FHA. This is problematic because it could cause people to experience psychic discomfort when they look through the classifieds for housing, lead to market limitations, and mislead the public into thinking that housing discrimination and discriminatory advertising are lawful.[223] These negative effects will be far less pronounced, however, if the field of permissible discriminators is limited to roommates.

To begin, people are likely to view roommate ads differently than those for more arms-length housing transactions, and their level of discomfort with these statements will vary accordingly.[224] Seeing a discriminatory preference in an ad for traditional rental housing would (appropriately) be disturbing to most readers. Given the high degree of intimacy involved in the roommate relationship, such preferences are less offensive. The ads suggest that the people who take them out are looking for "the right fit"—someone who they will be comfortable living with and whom will be comfortable living with them. This is particularly so in light of the fact that many of the problematic roommate ads contain self-descriptions of the person taking out the ad. People advertising for a shared living arrangement clearly want potential responders to have a significant amount of information about them—both in terms of protected characteristics like religion and unprotected characteristics like television viewing habits—and it is

---

221. craigslist, about > FHA, http://www.craigslist.org/about/FHA (follow "Questions? Comments? Check out the fair housing forum" hyperlink).

222. The confusion is heightened by the fact that HUD regulations currently permit people in shared living situations to advertise preferences based on sex, but no other protected categories. *See supra* notes 27, 41, 119.

223. *See supra* notes 62-65 and accompanying text.

224. One could argue that this different view of roommate ads cuts in favor of treating these ads under a different "ordinary reader" standard than those ads for traditional rental housing. *See supra* notes 24-25 and accompanying text.

likely that the people reading the ads also want this information.

It is also apparent that the trend of individuals wanting to room with people like themselves is not limited to particular group. Prior to the FHA's enactment, readers were likely to be confronted with a slew of "white only" housing ads, which would understandably cause distress for any non-white reader (and probably many white readers as well). Today the preferences expressed are as diverse as the people taking out the ads. While an individual reader might still be bothered by a particular ad, the hegemonic effect of ads that consistently favor the majority group is no longer present. Moreover, the text of the ads underscores the notion that the advertisers are not typically acting out of racial, ethnic, or religious animosity toward other groups. Rather, they seem to be acting out of a desire for a roommate with a similar background with whom they can share common values and experiences—such as an apartment where everyone keeps kosher or a house for European expatriates. This should reduce the likelihood that a person would experience discomfort reading the roommate ads.[225]

Similarly, allowing roommates to state discriminatory preferences would not have the same market-limiting effects as allowing discriminatory ads for traditional rental housing. Although seeing discriminatory ads for rental housing in large apartment buildings might give the impression that whole areas are off limits to groups with particular protected characteristics, it is clear that a given roommate ad applies only to one particular shared living situation with a specific person. Put another way, one is much more likely to take from a roommate ad that this person wants to live with a fellow Christian than this whole neighborhood is off-limits to people who are not Christians. Moreover, the fact that the few roommate ads specifying race, religion, or national origin tend to state preferences in all directions also makes it less likely that they will cause a consistent market limiting effect.

With respect to familial status, the picture is different. There are many more ads that discriminate based on familial status, and they give a consistent message that people with children are seldom welcome as roommates anywhere. Questions about market limitations are significant in light of the fact that one of the primary arguments in favor of amending the FHA to add familial status as a protected category was that many families with children faced serious shortages of housing because of the prevalence of child restrictive policies in the private rental market.[226] Surveys showed that 36% of rental properties excluded children entirely, while an additional 44% imposed restrictions on the age and number of

---

225. It is, of course, possible that if roommates are no longer covered by the FHA the ads will change. We may see more of the type of nasty and bigoted ads that were featured in the *Craigslist* and *Roommates* cases, which would increase the likelihood of reader discomfort. While there is a clear social norm against publicly making such statements, the anonymity of the on-line medium undoubtedly reduces the power of the norm.

226. For an overview of child restrictive policies and state laws to combat them, see generally Note, *Why Johnny Can't Rent—An Examination of Laws Prohibiting Discrimination Against Families in Rental Housing*, 94 HARV. L. REV. 1829 (1981).

children allowed.[227] This trend caused large numbers of families with children to live in substandard or overcrowded housing, to double up with other families, to split apart, or to become homeless.[228] Granting protection for familial status was therefore a necessary and appropriate response to this situation.

Whether the persistent bias in roommate ads operates as a meaningful market limitation for people with children, however, is a different question. As discussed previously, the Ad Review revealed that the vast majority of people who advertise for roommates on Craigslist do not have children (or at least do not indicate that they have children). Although there is currently no data on how many people with children use Craigslist to search for a shared housing arrangement, it is doubtful that this is common.[229] Most people with children would probably not want to live in close quarters with a stranger whom they met on Craigslist.[230] In the United States it is a cultural norm that families do not usually live with other people who are not family members.[231] It may be commonplace to live with roommates when one is young and single, but after a person marries and has children the expectation—and the reality—is that the family will have a house or apartment of its own.[232]

It is also unlikely that allowing roommate ads to contain discriminatory statements will cause people to believe that housing discrimination is legal or that other types of discriminatory housing ads are legal. Again, this relates to the different ways people view roommate ads. One can be aware of the fact that housing discrimination is illegal while simultaneously assuming that individuals

---

227. ROBERT MARANS ET AL., A REPORT ON MEASURING RESTRICTIVE RENTAL PRACTICES AFFECTING FAMILIES WITH CHILDREN: A NATIONAL SURVEY ch.7 (1980).

228. JANE G. GREENE & GLENIA P. BLAKE, HOW RESTRICTIVE RENTAL PRACTICES AFFECT FAMILIES WITH CHILDREN 1, 9 (1980), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/3a/26/5f.pdf (prepared for the Office of Policy Dev. & Research, U.S. Dep't of Housing and Urban Dev.).

229. Craigslist also features a "housing wanted" page, on which users who are in need of housing can post requests. The housing can be of any type—shared or rental. Based on an unscientific review, it appears that most people looking for shared housing are single people. The few posts by single parents or couples with children are almost always seeking a rental house or apartment as opposed to a shared living arrangement.

230. This assumes that they have the option of having a living arrangement that does not require them to share space with a stranger. Obviously, if a person with children is homeless, he or she would prefer to share an apartment with someone from Craigslist than to live on the street.

231. I use a loose definition of "family" here. A man who lives with his girlfriend and her two children may not technically be considered related to them because of the lack of a marital or blood tie. He is, however, part of the family unit, operating as a "functional" spouse and parent in a way that a random stranger from Craigslist would not.

232. Census data show that people who live with children are far less likely to live with housemates compared to people without children. In 2000, there were over 2.3 million households containing housemates and no children, and 302,824 containing both housemates and natural children. U.S. CENSUS BUREAU, EXAMINING AMERICAN HOUSEHOLD COMPOSITION, *supra* note 159, tbl. A-3, at 34.

are allowed to decide with whom they share a home. The Ad Review indicates that people apparently already draw a distinction between housing discrimination on the regular rental market and discrimination in shared housing, based on the fact that there were very few problematic ads for regular rental housing (and virtually none which stated preferences based on race, religion or national origin) but hundreds for roommates. Put another way, it appears that many people already believe that it is legal to express discriminatory preferences when seeking a roommate, and this belief has not led to a corresponding level of discriminatory ads for other types of housing.

There is one final argument against allowing exempt individuals also to be exempt from § 3604(c): Preventing such individuals from advertising their discriminatory preferences might lead to a change in social norms over time. For example, Joe, a white person, might think he only wants to live with another white person. Because he cannot say this in his ad, Joe is forced to interact with people of other races who reply to the ad. When he does, he may actually discover that he likes a particular person and decide that he can in fact live with someone of a different race. Allowing Joe to avoid interacting with people of different races will cut off this possibility for personal growth.[233] Similarly, when all of the Joes out there are free to advertise their discriminatory preferences, we become accustomed to seeing them. This desensitization leads us to accept without questioning the propriety of allowing race, religion, or ethnicity to play a role in determining our friends and intimates. Segregation, it can be said, starts at home. Our high levels of housing segregation are only possible because people consistently choose to marry and live with others of the same race. Until everyone starts questioning their "intimate" prejudices, large-scale change will be impossible.[234]

This argument is compelling. Greater inclusiveness at the societal level starts with the individual, and most would celebrate a world in which people no longer felt it necessary to include racial identifiers in their roommate advertisements. Yet the solution is probably not to prevent people from making such statements. First, to the extent that the ideal of nondiscrimination conflicts

---

233. This argument was suggested to me by Professor Eduardo Moisés Peñalver at the panel discussion for this Symposium.

234. *See* Note, *Racial Steering in the Romantic Marketplace*, *supra* note 172, at 894 ("[P]rivate discrimination of the sort these signifiers [in personal dating ads] convey is both the first and the final frontier of racial difference; until individuals can be dissuaded from accepting as normal the choice of intimates by race, race will always divide."). Studies show that living with a person of another race can reduce prejudice. *See* Colette Van Laar et al., *The Effect of University Roommate Behavior on Ethnic Attitudes and Behavior*, 41 J. EXPERIMENTAL SOC. PSYCH 329 (2004).

At the same time, some scholars recommend a renewed emphasis on decreasing housing discrimination in order to create more comfortable spaces for interracial couples and to facilitate new relationships across racial lines. Emens, *supra* note 172, at 1398-99. The "chicken and egg" nature of neighborhood-level racial separation and individual decisions to associate with members of one's own race has been an intractable problem, and is an issue beyond the scope of this Article.

with the norm of people being able to freely choose roommates based on whatever criteria they wish, as argued above, that the latter must prevail. If this is so, then it does little good to conceal the existence of these preferences and may in fact impose costs, both on an individual or on a societal level.[235] At the level of the individual, it is fairly paternalistic to use the law as a tool to encourage a person to change his preferences by preventing him from articulating them, particularly where the law does not prevent him from acting on them. (This is precisely the situation in which a social norm would be more efficient and less invasive than a legal intervention.[236]) Moreover, a statements ban deprives potential responders (and others) of useful information about the individual. At a broader level, keeping this information under wraps prevents us from realizing and assessing the true nature of the preferences and norms that are out there.

Finally, if there is a social norm that accepts expressions of such preferences in roommates,[237] it appears to be one shared by people of diverse racial, religious, and ethnic backgrounds. While this alone does not mandate the conclusion that the FHA should not apply to roommates, it does beg the question of whose interests are being protected by its current application—advocates who believe in the ideal of keeping housing advertisements free of discriminatory statements, or people of various racial, religious, and ethnic backgrounds who wish to express their diversity.[238] Encouraging a shift in social norms by preventing roommate-seekers from advertising such information about themselves or expressing such preferences for their desired roommate would, ironically, disproportionately affect minority group members who want to differentiate themselves from the majority or who seek a roommate who is a member of a minority group.

---

235. Richard McAdams refers to the phenomenon of when the law conceals the existence of a social norm or of norm violations as "privacy" or "secrecy". *See* McAdams, *supra* note 189, at 425-31. McAdams argues that an efficiency analysis must consider the costs of privacy: information necessary to satisfy preferences does not freely circulate, the public lacks information about the prevalence of a norm or of norm violations so that a weak norm may persist after the consensus around it fails. *Id.* at 429-431.

236. Indeed, to the extent that we do not see more roommate ads articulating racial, religious, or ethnic preferences, it is entirely possible that this is because people are conscious of social norms against making such statements, not because they are acting pursuant to the FHA.

237. In light of the fact that there were only 99 such ads out of a total pool of 5000, it would be a stretch to describe this as a dominant social norm.

238. The tension between valuing diversity and valuing nondiscrimination has long been addressed by civil rights and critical theory scholars. *See generally* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991); Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007); Patrick S. Shin, *Diversity v. Colorblindness*, 2009 BYU L. REV. 1175. A thorough discussion of this issue is beyond the scope of this Article.

D. There Is Still a Need for Website Publisher Liability

Once roommates are taken out of the equation, ads that potentially violate the FHA are relatively rare. The Ad Review revealed forty-nine problematic ads for rental housing out of 5000, or approximately 1% of the total. But this still adds up to a lot in terms of absolute numbers. The Ad Review was a snapshot of the first 500 ads visible on a given day for ten cities. For each city, each batch of 500 ads represented the total ads posted over a one or two day period. If we multiply forty-nine by half of the days in a year (182), this amounts to over 8900 discriminatory ads per year for just the Ad Review's ten cities—and these are only ads that appeared on Craigslist. Thus, in all likelihood, there are tens of thousands of discriminatory ads posted in cyberspace each year.

Currently, the only enforcement option for fair housing advocates is to aggressively prosecute the individuals who post the discriminatory ads.[239] This is the approach being pursued by the National Fair Housing Alliance (NFHA), a consortium of more than 220 non-profit fair housing organizations. NFHA has filed over 1000 administrative complaints against such individuals with the Department of Housing and Urban Development.[240] Other NFHA member organizations are pursuing a similar strategy.

This situation is less than ideal for a number of reasons. Pursuing an ad-by-ad enforcement strategy against individual advertisers is enormously inefficient. Websites hosting housing advertisements must be constantly monitored; discriminatory ads must be identified; and a complaint must be filed either in court or with the appropriate administrative agency.[241] If a complaint is filed in court, the litigation process can be time-consuming and expensive. Administrative complaints must be processed and investigated, then individually conciliated or referred for further litigation. Government agencies and advocacy groups like NFHA are the only entities equipped for such large-scale and intensive efforts. It is unlikely that many government agencies will commit the

---

239. Craigslist urged this approach and the Seventh Circuit Court of appeals endorsed it. *See* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (2008) ("Using the remarkably candid postings on craigslist, the Lawyers' Committee can identify many targets to investigate. . . . It can assemble a list of names to send to the Attorney General for prosecution.").

240. NAT'L FAIR HOUS. ALLIANCE, FAIR HOUSING ENFORCEMENT: TIME FOR A CHANGE: 2009 FAIR HOUSING TRENDS REPORT 32 (2009), *available at* http://www.nationalfairhousing.org/linkclick.aspx?fileticket=dsT4nlHikhQ%3d&tabid=3917&mid=5321 [hereinafter NAT'L FAIR HOUS. ALLIANCE, FAIR HOUSING ENFORCEMENT]. Most of the complaints were filed against landlords or rental management companies, as opposed to people seeking roommates. Telephone Interview with Anne Houghtaling, General Counsel for NFHA (Dec. 7, 2009).

241. NAT'L FAIR HOUS. ALLIANCE, FAIR HOUSING ENFORCEMENT, *supra* note 240, at 32. Complaints about violations of the federal FHA may be filed with HUD, which is statutorily obligated to investigate and attempt to conciliate the charge. *See* 42 U.S.C. § 3610 (2006). For violations of state fair housing laws, complainants may file a complaint with the state's administrative agency. *Id.* § 3610(f). State agencies' mandates and procedures for investigating and attempting to conciliate claims are usually similar to HUD's.

time and resources necessary for such an undertaking, and NFHA is already having difficulty handling the complaints for the violations it has identified.[242]

Pursuing legal action against people who post discriminatory ads to websites is also complicated by the difficulty in identifying the posters.[243] Sites like Craigslist do not typically collect identifying information about the people who post information to the site.[244] In addition, many sites protect their users' anonymity by creating a temporary and anonymous e-mail address for each advertisement.[245] The e-mails sent to this temporary address are then forwarded to the user's real address.[246] The responding individual never sees the true contact information unless the advertiser answers the inquiry.[247] It is possible to seek compulsory disclosure of a defendant's identity in state courts, but often the plaintiff must first set forth a prima facie case and obtain a third-party subpoena for the website operator's records.[248] If the website operator only has an e-mail address for a particular individual, then an additional search process is necessary to determine the owner of the e-mail account. These hurdles alone would be enough to dissuade most individual plaintiffs from filing suit. It was this problem, in fact, that thwarted NFHA's attempt to file administrative complaints with HUD against more than 1000 individual Internet advertisers. HUD rejected the complaints because they did not contain specific identifying information about the targets. HUD has stated that it will not use its subpoena power to compel the websites to provide identifying information about the individuals who post discriminatory ads.[249]

The sheer number of discriminatory advertisements on the Internet and the inefficiency of individually prosecuting the people who take out the ads lead to the conclusion that the CDA should be amended to take the FHA into account.[250]

---

242. NAT'L FAIR HOUS. ALLIANCE, FAIR HOUSING ENFORCEMENT, *supra* note 240, at 32; NAT'L FAIR HOUS. ALLIANCE, FOR RENT: NO KIDS, *supra* note 105, at 7-8.

243. *See* Kurth, *supra* note 74, at 828.

244. *Id.* at 828-30. Even if Craigslist did collect identifying information, as it now does when people post ads for "Adult Services," there is almost no way to guarantee that the information supplied corresponds to the person who actually made the posting. Brad Stone, *Craigslist to Remove 'Erotic' Ads*, N.Y. TIMES, May 14, 2009, at B1 (noting that erotic services advertisers now simply use "fake credit cards or untraceable debit cards").

245. Stephen Collins, Comment, *Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act*, 102 NW. U. L. REV. 1471, 1494 (2008).

246. *Id.*

247. *Id.*

248. *See* MADELEINE SCHACHTER, LAW OF INTERNET SPEECH 317 (2d ed. 2002).

249. NAT'L FAIR HOUS. ALLIANCE, FAIR HOUSING ENFORCEMENT, *supra* note 240, at 32-33.

250. A number of commentators advocate this result. *See* Collins, *supra* note 245, at 1495; *cf.* Chang, *supra* note 75, at 1001-03 (arguing for a judicially created FHA exemption for housing advertisements from the CDA); J. Andrew Crossett, Note, *Unfair Housing on the Internet: The Effect of the Communications Decency Act on the Fair Housing Act*, 73 MO. L. REV. 195, 211 (2008) (arguing that Congress should either amend the CDA to take the FHA into account, or state expressly that Congress intended the CDA to supersede the FHA).

This could be accomplished by simply adding the FHA to the list of exemptions already contained in the CDA.[251] As a result, website operators would be treated like newspapers with respect to the housing advertisements they run. They would be given the same incentives that publishers of traditional media have to filter out advertisements containing discriminatory housing messages, and the same incentives to educate users about the FHA's requirements.[252]

This is the single most effective way to reduce the number of discriminatory ads in cyberspace. The experience of print media bears this out. After § 3604(c) was unequivocally applied to newspapers, discriminatory classified ads were virtually eliminated because newspaper editors had the incentive to screen them out.[253] The same would likely happen if website operators were covered by the statute. Many commentators have argued that gatekeeper liability for website operators is the preferred approach for dealing with unlawful or malicious content, in part because website operators are in the best position to control the activity that takes place on their sites.[254] The ability to sue website operators, the least cost avoiders, also eliminates the need for fair housing plaintiffs to undertake the inefficient task of identifying and prosecuting the individuals who post discriminatory ads.[255]

One of the most significant arguments against gate-keeper liability is that the volume of postings to many sites makes it impossible to police their content. A

---

251. The CDA currently states that it is not to apply to prosecutions under a "Federal criminal statute," claims "pertaining to intellectual property," and claims involving "application of the Electronic Communications Privacy Act of 1986," or similar state statutes. 47 U.S.C. § 230(e)(1), (2), (4) (2006).

252. *See supra* note 70 and accompanying text.

253. *See supra* note 3 and accompanying text.

254. *See, e.g.*, Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 SUP. CT. ECON. REV. 221, 236-38 (2006) (arguing that "indirect liability is primarily attractive in cases where the indirectly liable party can detect, deter, or otherwise influence the bad acts in question. [Internet Service Providers] seem to be a natural choice under this criterion"); Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 265-68 (2005) (noting that "the key question for determining the propriety of intermediary liability is the plausibility that the intermediary could detect the misconduct and prevent it" and that "gatekeeper liability is systematically more likely to be effective in the modern Internet environment than it has been in traditional offline environments").

255. Lichtman & Posner, *supra* note 254, at 233-35 (noting that indirect liability is particularly necessary when the primary malfeasors are beyond the reach of the law, either because they are too difficult to identify or because they are judgment-proof); Mann & Belzley, *supra* note 254, at 259, 268, observe that

> regulation that seeks to prevent misconduct through controlling primary malfeasors is not always effective, particularly when individuals are judgment proof or when prosecution is not efficient either because of the high volume of transactions or because of the low value of each transaction. . . . [T]he relative anonymity the Internet fosters makes remedies against primary malfeasors less effective than in the brick-and-mortar context.

classifieds page for a newspaper in a mid-sized town might have a few dozen housing ads in a given week, whereas Craigslist has thousands of ads posted to its site each day, from all fifty states and Guam, Puerto Rico, and the Virgin Islands. As a result, according to Craigslist screening out discriminatory ads would be extremely difficult and not cost-effective. Because Craigslist's operates as a mere "bulletin board" for user-supplied content, it has a small number of employees relative to the volume of ads it hosts.[256] Craigslist would have to dramatically increase its employees to individually screen all housing ads. These costs would then presumably be passed on to site users. Although the costs may be minimal, this would still be a departure for many housing locator sites, which are free. The screening requirement may also cause time delays. Even minor delays may prove unacceptable to users who have become accustomed to having their ads posted immediately. These burdens could cause Craigslist and others to stop offering housing lists.[257] Given the huge number of people who currently go online to advertise and locate housing, this would be a significant loss to consumers.

Whether it is feasible for website providers to screen ads is obviously an important concern, but the fears about it are likely overblown. Although it is true that a website typically hosts a larger volume of third-party-supplied content than a print newspaper, the availability of filtering software makes it much easier to screen electronic content. Many sites already exercise some level of control over third-party content by screening for offensive or obscene postings.

---

256. *See, e.g.*, Memorandum in Support of Craigslist's Motion for Judgment on the Pleadings, Chicago Lawyer's Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 2006 WL 1232496 (N.D. Ill. Apr. 14, 2006) (No. 06 C0657) ("With a small staff in a single office in California, defendant craigslist, Inc. operates a website dedicated to local community classifieds and forums, where people share ideas and find things they need in their lives . . . and the vast majority of craigslist's services . . . are provided without charge. The quantity of user-supplied information exchanged on the craigslist site is enormous: in a typical month, users post more than 10 million new notices to the site.").

257. This is what Craigslist claims. *See* Brief of Defendant-Appellee Craigslist, Inc., Chicago Lawyer's Committee for Civil Rights v. Craigslist, Inc., 519 F.3d 666, 2007 WL 4453962, at *24 (7th Cir. 2007) (No. 07-1101). There is reason to believe that Craigslist's dire predictions about its own viability may be overblown. First, given the ease of posting things on-line and the dominant role that the Internet plays in modern life, it is safe to assume that small fees and minor delays will not cause people to rush back to the often cumbersome and expensive process of placing ads in print media. Second, Craigslist's own history belies its argument. Under pressure from several state attorneys general, Craigslist recently agreed to start charging people a fee to post ads for "Adult Services" on its site and to require them to provide a credit card number for identification purposes. Although this may have caused a slight decrease in the postings on Craigslist for adult services, *see* Stone, *supra* note 244, there are still thousands of these ads on the site. Moreover, this new policy has also generated millions of dollars in revenue for Craigslist. Andrew Beaujon, *Will Craigslist's New Stance on Adult Ads Save Alt-Weeklies?*, WASH. CITY PAPER, June 2, 2009, *available at* http://www.washingtoncitypaper.com/blogs/citydesk/2009/06/02/will-craigslists-new-stance-on-adult-ads-save-alt-weeklies/.

Website operators could employ filtering software that searches for hot-button words like "minorities," "kids," and "Christian" and automatically embargoes ads that contain those words until they can be reviewed further. Similarly, a relatively simple program could cause a "warning" message to pop up if a user attempts to submit an ad containing potentially problematic language. This would give the user the opportunity to remove the language. If the user chooses to leave the language, the ad would be filtered for individualized review. Using such techniques would relieve website operators of the burden of reviewing every single ad posted to the site.[258] Instead, they would only have to arrange for a staff person to review the ads that are filtered. Ads that contain suspect words but which turn out to be harmless could be cleared for posting after a brief review.

Another argument against making website operators liable for discriminatory ads is that this may lead them to overreact and over screen.[259] Specifically, they may filter out all ads that contain potentially problematic language, sweeping up individual ads that are not discriminatory.[260] Thus, an ad that states "black marble countertops in kitchen" might be unfairly blocked. At the same time, clever advertisers could word their ads in such a way as to evade filtering techniques. The steps outlined in the previous paragraph should address concerns about overscreening. At worst, some ads (which the user has chosen not to modify despite a warning message) might experience a delay in being posted. Concerns about cleverly worded ads slipping through could be mitigated by giving website operators an affirmative defense: If they use reasonable screening and blocking techniques, they will not be liable if a discriminatory ad evades them.[261]

E. More Attention Must Be Paid to Familial Status

Although publisher liability will go a long way toward eliminating discriminatory rental ads online, it is important to recognize that this merely throws a cover back over the issue. The underlying problems that caused so many discriminatory ads to appear will still remain. We will miss a valuable opportunity, then, if we fail to use the lessons we have learned from the

---

258. *See* Chang, *supra* note 75, at 1006-08; Mann & Belzley, *supra* note 254, at 268 ("[A]dvances in information technology make it increasingly cost effective for intermediaries to monitor more closely the activities of those who use their networks."). Indeed, Craigslist already allows users to run searches for specific terms, which is what allowed me to find so many discriminatory ads. Craigslist also currently employs a system in by which users can flag ads that are offensive for any reason. After a certain number of flags, the ad is taken down.

259. Chang, *supra* note 75, at 1006-08.

260. *Id.*

261. This general approach is advocated by Professors Mann and Belzley, who contend that giving internet intermediaries "safe harbors" if they engage in specifically defined conduct is preferable to a blanket imposition of liability. They reason that this approach encourages the intermediary to utilize "more sensitive and less blunt" screening techniques and preserves the Internet's "generative potential." Mann & Belzley, *supra* note 254, at 248-49.

discriminatory ads that we have seen. One of the clearest lessons is that there is a problem with the way the public perceives familial status and housing. Even without publisher screening, landlords are expressing virtually no racial, religious, or ethnic bias in their online classified ads.[262] The discriminatory ads placed by landlords are almost entirely based on familial status.[263] Thus, the discussion should be refocused on familial status discrimination, and the particular challenges it represents: Why is this still such a common basis for discrimination in ads,[264] and what should be done to address these underlying causes?

One problem may be a lack of information about the fact that familial status is a protected category under the FHA. It is clear that the general public is largely ignorant of this fact. A recent HUD survey of public awareness of fair housing laws found that only 38% of people knew that it was illegal to discriminate on the basis of familial status in housing.[265] Although it is safe to assume that individuals who rent housing are more knowledgeable about the FHA than the average member of the public, they may still be uninformed. As one commentator has noted, "many landlords are small owners . . . who are

---

262. It is important to note that the relative dearth of housing ads on Craigslist that express a racial, ethnic, or religious bias in no way means that housing providers no longer discriminate on these bases when it comes to making decisions about to whom to rent. To the contrary, all evidence demonstrates that such discrimination is pervasive, widespread, and extremely common in the traditional rental market. *See* Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 456-460 (2007) [hereinafter Schwemm, *Why Do Landlords Still Discriminate*] (describing the high degree of noncompliance with the FHA, in contrast with other civil rights laws). The best recent study on this issue was prepared for HUD, based on thousands of paired tests in dozens of metropolitan areas in 2000. The rental tests revealed that whites were favored over blacks 21.6% of the time, and over Hispanics 25.7% of the time. MARGERY AUSTIN TURNER ET AL., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE 1 HDS 2000, at iii-iv (Urban Inst. Metro. Hous. and Cmtys. 2002). Based upon these numbers, scholars estimate that annually, rental discrimination occurs against blacks more than 1.6 million times and against Hispanics more than 1.1 million times. NAT'L FAIR HOUS. ALLIANCE, 2004 FAIR HOUSING TRENDS REPORT at 2-3 (2004) (on file with author).

263. *See supra* text accompanying notes 119-22.

264. Although it is by far the most common basis for discrimination in on-line ads, familial status is only the third most-common basis for discrimination in complaints filed with governmental and fair housing agencies, after race and disability. *See* NAT'L FAIR HOUS. ALLIANCE, 2008 FAIR HOUSING TRENDS REPORT 48 (2008), *available at* http://www.nationalfairhousing.org/Portals/33/reports/2008%20Fair%20Housing%20Trends%20Report.pdf. Of course, the relatively smaller number of complaints may in part be attributable to public ignorance of the fact that familial status is a protected category. *See infra* text accompanying note 250.

265. *See* ABRAVANEL & CUNNINGHAM, *supra* note 194, at 11. In contrast, 67% of respondents knew that a housing ad that discriminated on the basis of religion would be illegal, and 81% knew that restricting a home sale to white buyers would be illegal. *Id.*

generally not subject to any training or licensing requirements."[266] Some 80% of the 4.3 million households who earn rental income from a second property have just one rental property, and at least one-third of these are only single-family rentals.[267] Small property owners tend to manage their properties themselves, without employing agents or an outside management company.[268] Indeed, the significant number of ads for rentals that blatantly discriminated on the basis of familial status identified by the Ad Review suggests that some portion of the people taking out the ads were ignorant of the fact that they were violating the law.[269]

If it is merely a problem of information availability, the solution is a more effective public education campaign about the familial status provisions of the FHA, which could be undertaken by HUD, fair housing organizations, local rental licensing agencies, and other entities with an interest in eliminating familial status discrimination in housing. Additionally, all websites that feature housing advertisements could be encouraged to provide this information to users in a clear and easy-to-find manner, much in the way that Craigslist does now.[270]

Greater public education about the law, however, is probably not enough. The fact that some landlords clearly do not see it as a problem to post rental ads that blatantly discriminate on the basis of familial status indicates that there is also a problem with the way that the public perceives familial status. By now, most people recognize that it is not socially acceptable to make statements of racial, religious, or national origin bias in rental housing advertisements. This is in large part due to the successes of the civil rights movement in changing attitudes about what is appropriate to say publicly about race, religion, and ethnicity.[271]

The same does not hold true for familial status. It is simply not as socially taboo to express bias against families with children in the housing context.[272] There are a number of reasons for this. First, familial status as a protected category is fundamentally different from race and ethnicity. Race and ethnicity are the paradigmatic, foundational categories upon which modern civil rights law

---

266. Schwemm, *Why Do Landlords Still Discriminate*, *supra* note 262, at 474.

267. *Id.* at 474 & n.102 (citing reports from the Joint Center for Housing Studies of Harvard University).

268. *Id.* at 474.

269. *See supra* text accompanying notes 115-18.

270. *See* Craigslist, *supra* note 207. Although this ultimately will not make a difference for the content of the ads for traditional rental housing—which, under my previous proposal will be screened—it may help to educate users about their substantive obligations under the FHA.

271. This broad recognition that it is unacceptable to make racially biased statements does not correspond to a lack of discrimination in practice. There is still ample evidence of housing discrimination based on race and national origin. *See supra* note 250.

272. One of the ads in the Ad Review perfectly illustrates the disparity between social norms regarding expressions of bias against children versus expressions of bias based on other characteristics: "[I] don't care what gender, nationality, religion, or sexual orientation you are . . . no children please." Dallas Craigslist, Sept. 2, 2009 (on file with author).

is based. They are immutable traits over which a person has no control, unlike familial status.[273] In contrast with race and ethnicity, the United States does not have a long history of invidious discrimination against families with children in all aspects of society. Indeed, "the FHAA's ban on familial status discrimination is unprecedented among the nation's anti-discrimination laws."[274] It is not at all clear, therefore, that familial status cases are viewed as having the same degree of public importance as cases based on race or ethnicity.[275]

Other scholars argue that, unlike race and ethnicity, familial status is relevant to a person's suitability as a tenant. They contend that objective factors such as increased noise and property damage cause landlords to discriminate against families with children, not some generalized animus against children.[276] Whether this is accurate, it is clear that Congress believed that the preference for living away from families with children is reasonable, as evidenced by the significant exemption it created in the FHA for Housing for Older Persons.[277] The statute specifically allows communities for seniors (either fifty-five or older or sixty-two or older) to exclude children, provided that certain requirements are met.[278] The record contains multiple statements by members of Congress that elderly people need to be "protected" from having to live near families with children, particularly because of their need for "peace and quiet."[279]

Whether it is because familial status is not taken seriously as a protected category or because people genuinely believe there are disadvantages to living near or renting to families with children, a significant majority of people surveyed believe that familial status discrimination should be legal in rental

---

273. Robert G. Schwemm, *The Future of Fair Housing Litigation*, 26 J. MARSHALL L. REV. 745, 757-58 (1993) [hereinafter Schwemm, *The Future of Fair Housing Litigation*]. Of course, although a person has some degree of control over whether she will have a child, a child has no control over whether or not he is born. I thank former student Brendan Fox for this insightful observation.

274. *Id.* at 758.

275. *Id.* at 757.

276. Michael A. Wolff, Comment, *The Fair Housing Amendments Act of 1988: A Critical Analysis of "Familial Status,"* 54 MO. L. REV. 393, 405-06 (1989).

277. *Id.* at 406-07 (arguing that "the problems children pose for the elderly are similar to the problems they pose for everyone else" and thus the Housing for Older Persons Exemption operates as an implicit recognition that it is reasonable for other housing providers to exclude children as well); *cf.* Schwemm, *The Future of Fair Housing Litigation*, *supra* note 273, at 758 (recognizing that the housing for older persons exemption endorses the concept that familial status discrimination is appropriate in some circumstances).

278. 42 U.S.C. § 3607(b) (2006).

279. *See, e.g.*, 134 CONG. REC. S10,544, S10,551 (daily ed. Aug. 2, 1988) (statement of Sen. McCain) (arguing that it is important not to "impinge upon the right of older Americans to enjoy peace and quiet in their retirement years"); *id.* (statement of Sen. Hatch) (arguing that the elderly have a right to live "in an environment that may be more peaceful than one which includes young children," and that there must be "some safeguard exemptions to the familial status language to protect" such housing options).

housing.[280] Changing these attitudes will require a shifting of social norms, and therefore we must first determine whether this is a situation in which the law should accommodate the norm or should instead displace the norm. Using the norm theory framework discussed previously, the first question to ask is whether the norm—here to exclude families with children from rental housing opportunities—is a harmful one. Does it, for example, perpetuate inequality and subordination of a particular group? Unlike the previous example of roommate preferences, which went in all directions and tended to favor minorities, the Ad Review and the legislative history of the FHA demonstrate that families with children are consistently disadvantaged in rental housing. In addition to the burden this places on families with children, there are social costs attendant with families who become homeless or who are forced to live in overcrowded and substandard conditions. Moreover, using the law to combat this social norm does not infringe on any rights. Unlike the roommate situation, in which privacy and associational rights were implicated, there is no "right" of landlords not to rent to families with children, or of people (other than certain elderly individuals) to live in a complex or neighborhood that is child-free.

Thus, the public must be convinced of the necessity and moral value of protecting families with children from housing discrimination in the rental market.[281] Rational choice theorists recognize that one way of changing a social norm is to provide people with additional information that will cause them to reevaluate their attitudes, as when anti-smoking activists sought to publicize the health effects of smoking.[282] In this vein, HUD or fair housing organizations could undertake advertising campaigns that describe the severity of the problem of discrimination against families with children that led Congress to add familial status to the FHA in the first place, including the widespread nature of the discrimination and the fact that it led to dire consequences for many families and for society as a whole.[283] A significant proportion of the American people are likely unaware of the magnitude of the problem that lead Congress to act in 1988, and they might change their attitudes about familial status discrimination once given that knowledge.

Another method of changing norms is to alter the social meaning of particular behaviors in order to change people's attitudes toward them, as when anti-smoking activists sought to portray smoking as dirty, rude, and low-class.[284]

---

280. ABRAVANEL & CUNNINGHAM, *supra* note 194, at 21 (finding sixty-two percent of respondents thought that familial status discrimination should be legal).

281. Schwemm, *Why Do Landlords Still Discriminate*, *supra* note 262, at 507-08 (arguing that increased enforcement of the law is unlikely to change persistent levels of discrimination, and that convincing people of the validity of fair housing laws may be the most effective way to ensure their compliance).

282. *See, e.g.*, Sunstein, *Social Norms and Social Roles*, supra note 190, at 930-31, 949; Alex Geisinger, *A Group Identity Theory of Social Norms and It's Implications*, 78 TUL. L. REV. 605, 618-19 (2004).

283. *See supra* note 213.

284. *See* Sunstein, *Social Norms and Social Roles*, *supra* note 190, at 949-951.

In this vein, HUD and others could include in their advertising campaigns an emotional appeal to the importance of the family in American life and the adversity many families face in finding adequate housing. Thus, a landlord's policy of excluding families with children would be re-framed: rather than a simple business decision taken for the perceived marginal convenience of his other tenants, it can be shown as a callous and devastating act which causes needless suffering for children.

CONCLUSION

Ultimately, the practical effect of my proposals would be as follows: Website operators would be liable for publishing discriminatory ads for non-shared housing. These ads, which comprise a relatively small number of the discriminatory ads, would therefore be screened from sight. Armed with the knowledge that there is clearly a continued ignorance of and resistance to the fair housing law with respect to familial status, housing advocates should focus their attention on both raising awareness and changing public attitudes. At the same time, people in shared housing situations, and only those people, would be exempt from both the substantive and the advertising aspects of the FHA.

The solutions I propose are not perfect, and I reach them with some ambivalence. As an academic who firmly believes in the need for fair housing laws and the goal of housing equality for all, it is not easy for me to conclude that a large segment of individuals should be allowed to freely express discriminatory housing preferences. But the highly individualized and expressive nature of the roommate ads, the diversity of preferences they articulate, and the intimate quality of the roommate relationship itself convince me that this is the best course of action, both as a legal and as a social matter.

There are many issues that this Article leaves for another day, the most significant of which is how the legal framework should address new technologies. For example, discriminatory housing ads can appear on other types of websites beyond classifieds, such as an individual's Facebook page.[285] The more personal the page is, the less palatable government regulation, screening, or civil liability for content will be. Perhaps an easy line can be drawn between websites that specifically offer classified advertisement services and personal websites. But what happens when these lines begin to blur, as people use existing technologies in new ways, such as a real estate company setting up a Twitter feed to sell property, or as entirely new developments allow for marketing based on increasingly sophisticated data mining and content delivery? One can imagine any number of scenarios in which technological advances present new challenges for the law. If and when this happens, hopefully scholars will recognize the opportunity for study, just as policy makers will use the information to develop effective and sensible legal responses.

---

285. *See generally* Susan B. Barnes & Neil Frederick Hair, *From Banners to YouTube: Using the Rearview Mirror to Look at the Future of Internet Advertising*, 5 INT'L J. INTERNET MARKETING & ADVERTISING 223 (2009).

APPENDIX—METHODOLOGY

I surveyed ads posted to Craigslist for ten cities: Atlanta, Boston, Chicago, Dallas, Denver, Las Vegas, Los Angeles, Minneapolis, New York, and St. Louis. For each city, I reviewed 1,000 ads, 500 posted under "apts/housing" (which is for traditional rentals and sales of housing) and 500 under "room/shared" (which is for roommates and other shared living situations). Each block of 500 ads was reviewed in a single day to minimize the likelihood of repeat postings. Upon review, it appeared that a small number of ads were repeat postings. I did not eliminate the repeat ads from consideration for two reasons. First, as a practical matter, many ads looked alike, and it was not always possible to confirm that a particular ad was a repeat posting; Second, each ad ran separately and, if discriminatory, would constitute a separate violation.

In some instances, the text of an ad posted to the "apts/housing" category made clear that it was in fact an ad for shared housing. In those cases, I reclassified the ad as one that properly belonged under "rooms/shared."

I only reviewed ads for compliance with the federal Fair Housing Act, meaning I only flagged ads that potentially discriminated based on race, sex, national origin, religion, disability, or familial status. I did not flag roommate ads that discriminated on the basis of sex, as HUD has issued regulatory guidance stating that such discriminatory preference is legal in shared living situations.

I flagged any obviously discriminatory advertisements, such as those which stated "no kids." I also flagged ads in which the advertiser self-identified according to any protected category. Because the standard for proving a violation is keyed to the "ordinary reader," I flagged ads that, although not overtly discriminatory, would still indicate discriminatory preference to the average reader. In so doing, I followed the guidance provided by HUD and the § 3604(c) case law. When in doubt about whether an ad should be considered discriminatory, I did not flag it. Thus:

- I concluded that ads which stated "Perfect for students or young professionals" indicated a dispreference for families with children because these are two groups with little in common except for age and the likelihood that they will not have children. I did not, however, flag ads that simply stated "Students welcome" or "Great for students," under the assumption that complexes that accept students (which not all rental complexes do) and are located near a university could announce these factors without necessarily indicating that families were not welcome. Similarly, I did not flag ads seeking "professionals," as this alone would simply indicate a preference for a person with a well-paying job and a (presumably) well-ordered lifestyle.
- I flagged ads that used catch phrases such as "seeking a mature and quiet individual" or "perfect for newlyweds or retired couples".
- I flagged ads that specified a maximum occupancy that was less than that set

forth in HUD's so-called "Keating Memo," which stated that two-people per bedroom was presumptively reasonable. Anything less than this—for example, an ad for a 2-bedroom apartment that says "two-person limit"—discriminates against families with children. I did not, however, flag ads which sought a single person (i.e., "roommate wanted") so long as nothing in the ad stated that it was limited to one individual.

- I flagged ads that stated a preference for people fluent in a particular language.
- I did not otherwise flag ads that might have had a disparate impact on particular protected categories. For example, an ad that required applicants to provide a drivers license would disproportionately prevent people with certain disabilities from applying, or an ad stating a preference for U.S. citizens would disproportionately affect national origin minorities. I chose not to flag these ads because the very definition of a disparate impact claim is that it does not allege overt discrimination of the sort that would communicate a preference to the ordinary listener.
- Similarly, I did not flag ads that said they would not accept responses from out of the state or out of the country. Although these statements would likely have a disparate impact on national origin minorities, it is clear from reading the ads that the advertisers are concerned with fraud, spam, and lack of accountability that might result from dealing with someone in another state or country via the Internet. I did, however, flag ads which stated "no foreigners."
- I did not flag ads that were essentially ads for employment where housing was part of the remuneration, such as live-in housekeeper or nanny.

REAL ESTATE MARKET MELTDOWN, FORECLOSURES AND TENANTS' RIGHTS

ALEATRA P. WILLIAMS*

INTRODUCTION

The nearly unparalleled levels of foreclosures resulting from the current real estate market meltdown reveal a significant gap in laws that address residential tenant rights. There exists a misconception by the general public that foreclosures only affect single family, owner-occupied homes, but foreclosures have also occurred on multiple family units and non-owner occupied homes in alarming numbers.[1] Until recently, tenants who lived in foreclosed properties typically had no legal recourse (or viable legal remedies) when confronted with eviction or ejectment proceedings precipitated by foreclosure actions against their landlords and/or property owners. These proceedings occurred notwithstanding compliance with lease agreements and other public policy obligations, thus potentially burdening already strained social programs for the homeless and impoverished. Therefore, foreclosures have been gut wrenchingly devastating for tenants and have especially hit hard tenants in vulnerable low-income and in minority communities.

In May 2009, the federal government took an unprecedented step into the landlord-tenant arena, which is traditionally and exclusively governed by state legislatures, when President Obama signed into law the Protecting Tenants at Foreclosure Act of 2009 (the "Act" or PTFA).[2] This step by the federal government manifestly indicates that the ills tenants face when their leased premises are foreclosed upon are indeed grave and that tenants do warrant protection.[3] The Act applies to all foreclosures of federally-related mortgages

---

* Assistant Professor, Charleston School of Law; B.A., Purdue University; J.D., University of Oklahoma; LL.M., University of California, Berkeley. I would like to thank the Real Estate Transactions and Property Sections of the American Association of Law Schools for the opportunity to present this Article at the 2010 Annual Meeting in New Orleans, Louisiana. I also wish to express my gratitude to Kerry Hegarty Webb (Charleston School of Law, Class of 2011) and Jenna M. Peyser (Charleston School of Law, Class of 2012) for their research assistance.

1. *See generally* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., AMERICA'S RENTAL HOUSING: THE KEY TO A BALANCED NATIONAL POLICY 14 (2008) (estimating that twenty percent of all foreclosure filings in the United States were on non-owner occupied premises in 2007).

2. Pub. L. No. 111-22, Div. A, Title VII, 123 Stat. 1660 (2009).

3. According to Vicki Been, Director of the Furman Center for Real Estate and Urban Policy, New York University, sixty percent of the 2007 foreclosures in New York City were on two- to four-family or multi-unit buildings. *See Neighborhoods: The Blameless Victims of the Subprime Mortgage Crisis: Hearing on H.R. 5818 Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Government Reform*, 110th Cong. 31-58, 381 (2008) (statement of Vicki Been, Director, Furman Center for Real Estate and Urban Policy) [hereinafter *Neighborhoods*], *available at* http://oversight.house.gov/images/stories/documents/20080522105505.pdf; *see also* Danilo Pelletiere & Keith Wardrip, *Renters and the Housing Credit*

and other mortgages foreclosed after May 20, 2009.[4] The Act provides some protections to tenants not currently incorporated under schemes. To the extent that any state law limits the protections, they are overturned.[5] However, states are free to implement any additional tenant protections than the Act provides.[6]

Before the PTFA, states had three primary approaches to dealing with the rights of tenants in foreclosure actions. First, a large number of jurisdictions permit foreclosure purchasers to summarily evict or eject tenants without notice.[7] Second, some jurisdictions require that foreclosing parties provide tenants with notices of foreclosure actions or require that tenants be made parties to the foreclosure proceedings.[8] Third, a few jurisdictions require the owner to show "good cause" or "just cause" before a tenant is evicted or ejected, under which foreclosure does not fall.[9]

Although ignored in many jurisdictions, the Act has tackled the imminent injury of eviction by providing a "stay of eviction" if the requirements are met.[10] On the other hand, the Act equally overlooks other critical harms tenants face when their landlords' mortgages are foreclosed upon. States are now poised to adopt protections for tenants that address all of the harms tenants face in addition to the federal law. The Act has set up a foundation of tenant protection upon which states must now build.

Part I of this Article discusses this present financial crisis and its effect on tenants and revisits the idea of security of tenure, the rights afforded to tenants and its benefits. Part II of the Article reviews the PTFA and examines the qualifications for protections and the application of the Act. Part II also critiques the Act based on the core values of the landlord/tenant relationship. Part III analyzes the normative framework of the three major approaches to tenants' rights in foreclosures and offers a critique of each based on the three fundamental principles of the landlord/tenant relationship: privity of contract, security of the

---

Crisis, 4 POVERTY & RACE 3, at 3 (July-Aug. 2008) (stating that half to more than half of all persons living in foreclosed building were tenants); John Leland, *As Owners Feel Mortgage Pain, So Do Renters*, N.Y. TIMES, Nov. 18, 2007, at A1 (recognizing in Nevada that twenty-eight percent of the mortgages in foreclosure were not owner-occupied).

4. *See* Pub. L. No. 111-22, Div. A, Title VII, § 702, 123 Stat. 1660.

5. *See* Bank of Am. v. City & County of San Francisco, 309 F.3d 551, 558 (9th Cir. 2002) (noting that should there be a conflict between state and federal laws, federal law preempts state law pursuant to the Supremacy Clause of Article VI, Clause 2 of the U.S. Constitution).

6. *See, e.g.*, Baker v. John Morrell & Co., 266 F. Supp. 2d 909, 933 (N.D. Iowa 2003) (stating that federal law "establishes a floor, not a ceiling" and that "states are free to grant more protection than federal law provides").

7. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY AND NAT'L LAW INCOME HOUS. COAL., WITHOUT JUST CAUSE: A 50-STATE REVIEW OF THE (LACK OF) RIGHTS OF TENANTS IN FORECLOSURE 7 (2009), *available at* http://www.nlchp.org/content/pubs/Without_Just_Cause1.pdf [hereinafter 50-STATE REVIEW].

8. *Id.*

9. *Id.*

10. Pub. L. No. 111-22, Div. A, Title VII, § 702, 123 Stat. 1660.

property interest, and equity. I argue that state legislatures must take affirmative steps to protect tenants from injury due to foreclosure of their leased premises. To that end, a legislature has one of two ways to safeguard tenants' rights during foreclosure: (1) amending a state's evictions laws; or (2) modifying a state's foreclosure processes. In Part IV, I contend that tenant rights in foreclosure can be more effectively and comprehensively addressed under customary eviction processes as incorporated under states' Residential Landlord and Tenant Acts. The Article concludes by recommending that states amend their Residential Landlord and Tenant Acts to provide tenants with more security upon foreclosure, before the sunset of the PTFA on December 31, 2012.

I. HISTORY REVISITED: THE SECURITY OF TENURE DILEMMA

A. History Revisited

U.S. officials have acknowledged that the United States has not faced a more serious financial crisis since the Great Depression.[11] Although it is true that the cataclysmic financial event of the 1930s had a profound effect on both the economic and real estate markets in America, the financial meltdown beginning around 2006 has had a greater catastrophic effect on several aspects of the financial market than the historical downturn. Certain characteristics of this current economic catastrophe make it particularly worrisome. The consequence of the current real estate market collapse and the resulting foreclosures and their effect on the tenant market is unparalleled in history.

Today's economists have blamed the rise in the subprime lending market and securitization of these mortgages for causing this current real estate market meltdown.[12] In its heyday, subprime loans comprised almost thirteen percent of the mortgage origination market.[13] According to Ben S. Bernanke, Chairman of the Federal Reserve Board:

> Subprime mortgages are loans made to borrowers who are perceived to have high credit risk, often because they lack a strong credit history or have other characteristics that are associated with high probabilities of

---

11. Barack H. Obama, President of the United States, Remarks by the President to the Business Roundtable (Feb. 24, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-business-roundtable; Ben S. Bernanke, Chairman, Fed. Reserve Bd., Four Questions about the Financial Crisis (Apr. 14, 2009), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20090414a.htm (stating that "[t]he financial crisis, the worst since the Great Depression, has severely affected the cost and availability of credit to both households and businesses").

12. *See, e.g.*, Ben S. Bernanke, Chairman, Fed. Reserve Bd., The Subprime Mortgage Market (May 17, 2007), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20070517a.htm.

13. Harold L. Bunce et al., *Subprime Foreclosures: The Smoking Gun of Predatory Lending?*, HOUSING POLICY IN THE NEW MILLENNIUM, 257, 257 (2001), http://www.huduser.org/portal/publications/pdf/brd/12Bunce.pdf.

> default. Having emerged more than two decades ago, subprime mortgage lending began to expand in earnest in the mid-1990s, the expansion spurred in large part by innovations that reduced the costs for lenders of assessing and pricing risks.[14]

Subprime loans are not wretched mechanisms;[15] they allow those with limited or otherwise impaired credit to have purchasing power.[16] The largest asset in an individual's or family's financial portfolio is typically a home. Subprime mortgages permitted those who would have been shut out of the market decades ago the possibility to accumulate such wealth.[17] Thus, in normal situations, subprime loans served a tremendous function. However, in order to make credit more readily available, mortgage brokers, lenders, and loan underwriters engaged in questionable behavior, i.e., aggressive "credit peddling."[18] This aggressive behavior launched subprime mortgages into the economic bomb in today's market.[19] What resulted from this behavior, at least partly, is this current economic crisis. Chairman Bernanke stated: "The credit boom began to unravel in early 2007 when problems surfaced with subprime mortgages—mortgages offered to less-creditworthy borrowers—and house prices in parts of the country began to fall. Mortgage delinquencies and defaults rose, and the downturn in house prices intensified, trends that continue today."[20]

The subprime mortgage fiasco affected tenants as well as mortgagors. When the mortgagor defaulted on these subprime mortgages due to the mortgagor's inability to pay the exorbitantly high mortgage payments, the mortgagee typically foreclosed.[21] Consequently, foreclosures affected tenants in alarming numbers.[22]

---

14. Bernanke, *supra* note 12.

15. Anne-Marie Motto, Note, *Skirting the Law: How Predatory Mortgage Lenders are Destroying the American Dream*, 18 GA. ST. U. L. REV. 859, 863 (2002) (stating that not all subprime loans are predatory).

16. *See* Kenneth C. Johnston et al., *The Subprime Morass: Past, Present, and Future*, 12 N.C. BANKING INST. 125, 126 (2008); *see also In re* First Alliance Mortgage Co., 471 F.3d 977, 984 (9th Cir. 2006) (noting that subprime loans allow people to borrow who "might otherwise be denied credit").

17. *See generally Protecting Homeowners: Preventing Abusive Lending While Preserving Access to Credit, Hearing Before the Subcomm. on Housing and Community Opportunity and the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 108th Cong. 3 (Nov. 5, 2003) (statement of Allen J. Fishbein, Director of Housing and Credit Policy, Consumer Federation of America) (explaining that predatory and subprime lending has allowed minority and low-income groups to acquire wealth through owning a home and refinancing).

18. *Id.* A credit peddler is one who uses aggressive actions to push credit onto a consumer.

19. *See, e.g.*, EDWARD M. GRAMLICH, SUBPRIME MORTGAGES: AMERICA'S LATEST BOOM AND BUST (2007).

20. Bernanke, *supra* note 11.

21. *See* Vicki Been et al., *The High Cost of Segregation: Exploring Racial Disparities in High-Cost Lending*, 36 FORDHAM URB. L.J. 361, 362-63 (2009) (explaining that foreclosure rates

The American dream of fame, prosperity, and home ownership has been a part of the American landscape for decades. It is generally accepted that we may not all become rich or famous, but owning a home is the exception. Most Americans believe that homeownership is not only possible, but likely.[23] However, for some, the American dream may never become reality. For these people, the American dream may be delayed if not entirely misplaced during their lifetimes. The attainment of a home is highly unlikely to the destitute; they are destined to be lifelong tenants. Thus, their rental property is their "home" for all intents and purposes.

Most would agree that times have changed since the real estate market heyday. More people are renting instead of buying, causing the rental market to increase exponentially.[24] Today, because of the market downturn, there is a credit crunch. It is simply more difficult to qualify for loan products in order to purchase a home. There are multiple explanations as to why banks will say "no" to a credit application. Some consumers will not qualify due to their impaired creditworthiness or solvency; others may not qualify because financial institutions have revamped their qualification requirements, requiring larger down payments. On the other hand, some consumers are saying no to mortgages even though they qualify for financing. Many consumers are skeptical of financial institutions, having been "burned" by foreclosure or the real estate market meltdown.[25] Thus, regardless of whether the reason for renting is based on choice or lack thereof, tenants who will rent for extended periods of time need physical, social, economic, and emotional stability. The most effective way to cater to these needs is to enact laws, which protect such tenants from landlords and mortgagees.

Foreclosures typically wipe out all interests in the foreclosed premises, including leasehold interests, which are subsequent to the recordation of a mortgage.[26] A large number of tenants, much to their chagrin, quickly learned

---

were increased for subprime and adjustable rate mortgages and were mainly in racial minority communities).

22. *See, e.g.*, JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 1; *see also Neighborhoods*, *supra* note 3.

23. *See* Charles Feldman, *Fannie Mae Survey: Americans Still Believe in Home Ownership*, WALLET POP, Apr. 8, 2010, *available at* http://www.walletpop.com/blog/2010/04/08/fannie-mae-survey-americans-still-believe-in.

24. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 1, at 2 (stating that the "number of renter households jumped by 2.8%" to one million households from 2003 to 2006).

25. Raymond H. Brescia, *Trust in the Shadows: Law, Behavior, and Financial Re-Regulation*, 57 BUFF. L. REV. 1361, 1362 (2009) (arguing that an "aspect of this crisis is the relative lack of trust in our financial institutions: the very institutions that helped to inflate a speculative real estate bubble, the collapse of which has brought about the greatest economic crisis in eighty years"); *see also* Thomas J. Sugrue, *The New American Dream: Renting*, WALL ST. J., Aug. 14, 2009, *available at* http://online.wsj.com/article_email/SB10001424052970204409904574350432677038184-lMyQjAxMDA5MDEwOTExNDkyWj.html.

26. *See generally Effect of Foreclosure of Mortgage as Terminating Lease*, 14 A.L.R. 664

that their leaseholds would soon be terminated due to no fault of their own. Tenants, facing eviction, discovered that many of them were without legal remedies. These tenants typically had thirty days to find alternate, affordable housing. Not only was housing more competitive because the number of renters grew with the addition of foreclosed owners, but tenants now had a negative rental history, eviction, due to mortgagee's desire to gain possession of the purchased property. The perfect economic storm created by the mortgage and housing market crash has created this common result in many cities.

B. The Security of Tenure Question

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, *housing* and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[27]

The Universal Declaration of Human Rights recognizes the "right to adequate housing as essential to an adequate standard of living."[28] Security of tenure offers protection to tenants against removal from the leased premises by landlords who might remove (evict) them or arbitrarily increase rent except for exceptional reasons.[29] Scholars have described security of tenure as "a critically important human need."[30] Tenants vested with security of tenure have certain benefits, such as a sense of community and roots.[31]

The U.S. position is in accord with the Universal Declaration of Human Rights. The Housing Act of 1949 first set forth a housing policy that included "the realization as soon as feasible of the goal of a decent home and suitable living environment for every American family."[32] The U.S. Department of Housing and Urban Development's mission is to increase homeownership, support community development, and increase access to affordable housing free from discrimination.[33] This mission extended the aim of the 1949 Housing Act.

(1921).

27. Universal Declaration of Human Rights, G.A. Res. 217A, art. 25(1), U.N. GAOR, 3d Sess., 1st Plen. Mtg. 1 U.N. Doc. A1810 (Dec. 10, 1948).

28. UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME, THE STATE OF THE WORLD'S CITIES 32-33 (2001), *available at* http://www.un.org/ga/Istanbul+5/32.pdf.

29. *See generally* Florence Wagman Roisman, *The Right to Remain: Common Law Protections for Security of Tenure: An Essay in Honor of John Otis Calmore*, 86 N.C. L. REV. 817 (2008).

30. *Id.* at 817.

31. Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate*, 19 GA. L. REV. 483, 530 (1985).

32. Pub. L. No. 81-171, 63 Stat. 413 (codified in scattered sections of 42 U.S.C.).

33. U.S. Dep't of Housing and Urban Dev., Mission Statement, http://portal.hud.gov/portal/page/portal/HUD/about/mission.

Thus, housing is a fundamental American right.

If one considers shelter as an imperative need, then the law should guard residential tenants against forfeiture of their home without good or just cause. Of course, tenants with bargaining power may negotiate protections in their lease agreements which provide them with security of tenure. However, tenants are not likely to seek tenure security because they may be unaware of this possibility and may not have the necessary bargaining power to do so.[34] If tenants are unable to protect themselves, governmental action may be crucial.

Protecting a tenant's tenure is not a foreign concept or unusual action for federal and/or state governments. Both have taken steps to shelter tenants from unmerited ejections by landlords. Many states have enacted "just cause" or "good cause" eviction statutes.[35] In these states, tenants are shielded from termination of their leaseholds by landowners unless the reason is enumerated.[36] The federal government has also enacted a "just cause" eviction statute for Washington, D.C.[37]

For many years, jurisdictions have struggled to provide protection to tenants against the whims of their landlords. Jurisdictions have focused on: (1) eviction[38]—being physically or constructively evicted; (2) rent[39]—preventing tenants from capricious rent increases; and (3) discrimination[40]—protecting classes of tenants from discrimination in obtaining housing. Because the landlord's actions must be justified, tenants already have some form of tenure security in their leasehold interests.

However, the modern mortgage crisis shows the extent of the deficiencies in tenure security. Today, because of this current financial crisis, tenants again struggle with security of tenure. The present financial crisis also illustrates how extensively security of tenure is threatened by an actor not typically made the focus in this debate, the mortgagee. Because foreclosure wipes out landlords and tenants' interests in leased premises, mortgagees are the actors who evict tenants from the leased premises. Likewise, the lease, to which the landlord and tenant were bound, is also unenforceable against a mortgagee in most jurisdictions absent an attornment and non-disturbance agreement.[41] Thus, a tenant has no

---

34. Roisman, *supra* note 29, at 817-18 (stating that most tenants "are not wealthy enough to obtain security of tenure by agreement with the landowner, and therefore rely upon the government to assure them some protection against arbitrary terminations of occupancy by the landowner").

35. *See, e.g.*, N.H. REV. STAT. ANN. § 540:2 (2007); N.J. STAT. ANN. § 2A:18-61.1 (Supp. 2010).

36. N.H. REV. STAT. ANN. § 540:2; N.J. STAT. ANN. § 2A:18-61.1.

37. D.C. CODE § 42-3505.01 (Supp. 2009).

38. N.H. REV. STAT. ANN. § 540:2; N.J. STAT. ANN. § 2A:18-61.1.

39. *See, e.g.*, CONN. GEN. STAT. § 47a-20 (2006); MASS. GEN. LAWS ANN. ch. 186, § 18 (West 2003 & Supp. 2010); OHIO REV. CODE ANN. § 5321.02 (West Supp. 2009); WASH. REV. CODE. § 59.18.240 (2004).

40. *See, e.g.*, 42. U.S.C. §§ 3601-3629, 3631 (2006).

41. Robert D. Feinstein & Sidney A. Keyles, *Foreclosure: Subordination, Non-Disturbance and Attornment Agreements*, 3 PROBATE & PROPERTY 38 (1989) (noting that under an attornment

contractual basis to assert any rights of continued tenancy.[42] Also, the protections of tenure afforded to tenants are generally enforceable against the landlord, not the mortgagee.[43]

Typically, the parties who are bound to comply with "just cause" statutes are landlords.[44] This not only applies to the one whom entered into the contractual relationship with tenant, but it has a broader meaning. The term "landlord" is simply defined as the individual with legal title to the leased premises.[45] As the purchaser of the foreclosed property, a mortgagee or third party purchaser is the "landlord" for the purposes of the "just cause" statutes.[46] Should state landlord-tenant acts prohibit mortgagees or third parties from interfering with tenants' tenure without good or just cause, there is no element of surprise; it is simply an iteration of existing laws in this area.

Mortgagees must comply with the PTFA, which provides short-term security of tenure to tenants.[47] The Act unequivocally applies to mortgagees or purchasers at a foreclosure sale.[48] However, the protections are short-term, ending in December 31, 2012.[49] The right to adequate housing, a national concern, is inextricably linked to legal security of tenure. Evictions due to foreclosures of leased premises result in unjust consequences for tenants. Federal or state intervention is required to eradicate this injustice for the long-term.

II. FEDERAL TREATMENT OF TENANTS' RIGHTS IN FORECLOSURE

A. Protecting Tenants at Foreclosure Act of 2009

On May 20, 2009, President Barack Obama signed the PTFA into law.[50] The Act recognizes the disturbing lack of tenant rights in foreclosures and offers temporary protections to tenants who live in residential properties that are sold at a foreclosure sale on or after May 20, 2009, the Act's effective date.[51] Before the Act was signed into law, tenants were subject to the laws of their jurisdictions, a majority of which permitted immediate eviction upon

---

agreement that a lease will not be extinguished, but will continue as between the mortgagee and tenant).

42. O'Brien Props., Inc. v. Rodriguez, 576 A.2d 469, 472 (Conn. 1990) (stating that foreclosure extinguishes the lease and makes tenant a tenant at sufferance).

43. First Fed. Bank, FSB v. Whitney Dev. Corp., 677 A.2d 1363 (Conn. 1996).

44. N.H. REV. STAT. ANN. § 540:2 (2007); N.J. STAT. ANN. § 2A:18-61.1 (2000 & Supp. 2008).

45. N.H. REV. STAT. ANN. § 540:2; N.J. STAT. ANN. § 2A:18-61.1.

46. *First Fed. Bank, FSB*, 677 A.2d at 1368.

47. Pub. L. No. 111-22, Div. A, Title VII, § 701, Stat. 1660.

48. *Id.* § 703.

49. *Id.* § 704.

50. *Id.* § 702.

51. *Id.*

foreclosure.[52]

The crux of the PTFA's protection is that it allows covered tenants to remain in their leased premises until the foreclosure purchaser (the immediate successor in interest) gives the tenant at least ninety days advance notice to vacate.[53] Tenants with unexpired lease terms may be permitted to remain in the leased premises until the lease terminates on its terms.[54] However, if the buyer or some subsequent purchaser intends to move into the home and make it a primary residence, the tenant will be required to vacate after at least ninety days advance notice.

Not all tenants affected by foreclosures are qualified to receive relief under the PTFA. In order to qualify for protection, there are two requirements. First, the Act applies to any foreclosure on a "federally-related mortgage loan or on any dwelling or residential real property" after the law's enactment date.[55] Per the PTFA, the term "federally-related mortgage loan" has the same meaning as defined under the Real Estate Settlement Procedures Act of 1974 (RESPA).[56] Under the RESPA, the term "federally-related mortgage loan" encompasses "any loan (other than temporary financing such as a construction loan)" which is "secured by a first or subordinate lien on residential real property . . . designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property."[57] It is clear from the RESPA definition that tenants of mortgagors who purchased a multi-unit apartment complex, condominium, or cooperative are not protected by the PTFA.[58]

Second, a tenant must be a "bona fide tenant"[59] for protection under the PTFA.[60] Under the PTFA, a tenancy is bona fide if:

> (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the

---

52. 50-STATE REVIEW, *supra* note 7, at 7.

53. Pub. L. No. 111-22, Div. A, Title VII, § 702(a)(2)(B), 123 Stat. 1660.

54. *Id.* § 702(a)(2)(A) (stating that a bona fide tenant whose lease was entered into before the notice of foreclosure may be permitted to occupy the premises until the "end of the remaining term of the lease").

55. *Id.* § 702(a).

56. *Id.* § 702(a)(2)(c); *see also* 12 U.S.C. § 2602 (2006). RESPA is a consumer protection statute designed to require disclosure of certain financial matters in clearer terms to mortgagors. 12 U.S.C. § 2602.

57. 12 U.S.C. § 2602.

58. *Id.*

59. Pub. L. No. 111-22, Div. A, Title VII, § 702 (a)(2), 123 Stat. 1660. The date to determine whether a tenant is bona fide is presumably as of the date of the notice of foreclosure, a point on which the PTFA is unclear.

60. *Id.* § 702(b).

property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy.[61]

Enacting the PTFA is a great step in the right direction. However, there are several shortcomings of the PTFA, which must be addressed in order to provide adequate protection to tenants who face eviction upon foreclosure. First, though the PTFA is self-executing,[62] meaning that no action is required by the government to be effective, the protections of the PTFA appear to be invoked only upon litigation by the tenant or as a defense to an eviction action.[63] Once an action has been instituted, the tenant must prove that he or she is qualified for protection under the PTFA.[64]

To defend against eviction, a tenant must prove that his or her landlord's mortgage loan is a "federally-related mortgage loan" and that his tenancy is a bona fide tenancy.[65] When tenants are evicted, a great majority of tenants are unrepresented by legal counsel. Proving that the PTFA applies may be an enormous and expensive burden for tenants to carry. Furthermore, because of the PTFA's newness, tenants, landlords, judges, and attorneys are uninformed of its application.

Second, other certain classes of tenants will not be isolated from foreclosure under the PTFA: (1) uninformed and unsophisticated tenants; (2) unrepresented tenants; and (3) lower class and/or indigent tenants. Because tenants are not granted automatic protection, only those groups of tenants who know of the law and can afford litigation will receive protection. Already financially strained consumer advocacy groups will be charged with informing tenants of these rights.

Third, the PTFA was enacted only to provide temporary relief; the protections cease on December 31, 2012.[66] On and after January 1, 2013, the pre-emptive nature of the PTFA halts, possibly allowing foreclosure purchasers to summarily evict or eject tenants. If there is a problem with the recognition of tenant rights in foreclosure, then the problem will not disappear at a later time. Thus, tenants in the future should be guaranteed protection as well.

Fourth, the fundamental purpose of the PTFA is to provide tenants with ninety days notice before seeking alternative housing.[67] The main concerns of

---

61. *Id.* § 702 (b)(1)-(3).

62. Letter from Sandra F. Braunstein, System Director, Division of Consumer & Community Affairs to the Officers and Managers in Charge of Consumer Affairs, Board of Governors of the Federal Reserve System (July 7, 2009), http://www.federalreserve.gov/boarddocs/CALETTERS/2009/0905/caltr0905.htm (noting that "[t]he law is self-executing; no federal agency has authority to issue regulations implementing the law or to interpret the law").

63. Pub. L. No. 111-22, Div. A, Title VII, 123 Stat. 1660.

64. *Id.*

65. *Id.* § 702.

66. *Id.* § 704.

67. If a tenant's lease is current, then the tenant may be permitted to continue his or her lease to its termination date per the lease agreement, unless the new purchaser intends to make the leased

tenants, the immediate economic loss associated with eviction and the prospect of social and cultural instability arising from displacement from their communities, are not adequately addressed by the Act. In rental markets where housing is scarce, particularly affordable housing, ninety days is simply not enough time. Therefore, many tenants may end up homeless.[68]

Fifth, most foreclosures in this current market meltdown are the result of the subprime mortgage debacle which began to skyrocket in the late 1990s.[69] The recipients (or victims) of subprime mortgages were largely African Americans and Hispanics.[70] Typically, these racial groups have been historically leery of the legal process. Therefore, when an eviction action is presented, these groups are not likely to defend. Thus, requiring litigation before protection under the PTFA will continue to target and isolate these racial groups. Further, foreclosures based on the subprime/predatory lending practices would result in fragmentation of these communities.

Sixth, the newness of the Act leaves the door wide open for interpretation of key issues and several questions remain unanswered on the face of the statute. For example, is the notice to vacate similar to an eviction notice? If so, the stain of eviction remains on a tenant's record. Similarly, what are the terms of the parties' agreement during the ninety-day periods? Who has the duty to repair and maintain the premises? Also, what happens to tenants' security deposits? What happens if the tenant is in default or defaults during the ninety-day period? Similarly, does the PTFA apply to holdover tenancies? Other questions include: Is the landlord's immediate successor in interest required to return the security deposit to the tenant? Must one fill in the gaps with a state's version of the Residential Landlord and Tenant Act?

Additionally, the PTFA applies only to the immediate successor at the foreclosure sale.[71] Suppose that an investment trust, one created to take advantage of distressed property, purchases the property at a foreclosure sale. The trust's intent is not to hold on to the property but sell it as soon as possible. Would this transfer void the application and protections of PTFA? Furthermore, does it create a loophole for foreclosure purchasers by permitting a subsequent sale to a third party (straw man)? Finally, what happens if the tenant is in default? Is the ninety-day stay shortened?

Although the PTFA has made tremendous strides in providing tenants with safeguards after foreclosure, there are more efficient ways to protect tenants

---

premises his or her primary residence. *Id.* § 703(1)(i). If so, the tenant must be given ninety days notice to vacate. *Id.* § 703(1)(ii).

68. Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUS. POL'Y DEBATE 461, 468 (2003). *See* U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES 13-15 (2008) (noting an increase in homelessness as a result of the foreclosure crisis in 2008).

69. Bunce et al., *supra* note 13.

70. *See* Been et al., *supra* note 21, at 361-64 (asserting that Hispanics and African Americans are more likely to have financed their homes using subprime mortgages).

71. Pub. L. No. 111-22, Div. A, Title VII, § 703(2), 123 Stat. 1660.

more—through reformation of a state's iteration of the Residential Landlord and Tenant Act. The Act states that, "nothing under this section shall affect . . . other additional protections for tenants."[72] Accordingly, state law could give further protections to tenants than the PTFA, but not less. Therefore, now is an opportune time for modifications to state Residential Landlord and Tenant Acts.

III. STATE TREATMENT OF TENANTS' RIGHTS IN FORECLOSURE

The National Law Center on Homelessness & Poverty and the National Low Income Housing Coalition (collectively referred to as NLCHP) recently assembled a report which reviews tenant rights upon foreclosure in all fifty states.[73] Presumably upon the sunset of the PTFA, and if states have not modified their landlord and tenant acts, the following are three major approaches to tenants' rights in foreclosure actions.[74] First, and in most instances, tenants have no rights in the foreclosure action and are evicted from the premises.[75] Second, some jurisdictions do not terminate the tenancy, but allow the tenancy to survive.[76] Third, some jurisdictions require that tenants be made a part of the foreclosure as a party and/or must be provided notice of the foreclosure.[77] Thus, when faced with foreclosure, a tenant must first determine what the law of his/her jurisdiction entails.

A. Tenancy Terminated Upon Foreclosure

1. "First in Time, First in Right."—Eviction is "a summary court proceeding to remove a tenant or occupant from or otherwise recover possession of real property."[78] Before the PTFA, several jurisdictions permitted foreclosure purchasers to terminate any tenancies and evict tenants without notice.[79] Whether a tenancy survived or was terminated upon foreclosure usually depended on the priority of the leasehold compared to the mortgage, i.e., was the lease "first in time"?[80] If the tenant executed the lease before the landlord-

---

72. *Id.* § 702(a)(2).

73. 50-STATE REVIEW, *supra* note 7.

74. *Id.* at 6.

75. *Id.*

76. *Id.* at 6-8.

77. *Id.*

78. MINN. STAT. ANN. § 504B.001 (West 2002).

79. These jurisdictions include: Alabama, Arizona, Arkansas, Georgia, Hawai'i, Kentucky, Michigan, Mississippi, Nebraska, New Hampshire, New Mexico, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, and Virginia. 50-STATE REVIEW, *supra* note 7, at 7 n.3.

80. Low-income tenants, section 8 tenants, unlike other tenants, have extensive protections from eviction. *See, e.g.*, Carter v. Md. Mgmt. Co., 835 A.2d 158, 163-64 (Md. 2003) (recognizing that "[a] new owner who acquires the building by virtue of a foreclosure or the existing owner . . . may not evict or terminate the leases of low-income tenants, other than for good cause"). Certain classes of tenants are shielded from evictions. For discussion on those typically protected, see

mortgagor executed the mortgage, then the tenancy is unaffected by the foreclosure.[81] On the other hand, if the tenant executed the lease, subsequent to when the mortgagor executed the mortgage, then the tenancy is terminated by the foreclosure.[82] For example, if a tenant is in possession of the mortgaged property, a foreclosure purchaser may be deemed to have at least inquiry notice of the tenant's prior right.

If the common law principle of "first in time, first in right" is not abrogated by legislative or judicial action, tenants will be summarily evicted or ejected from the leased premises by foreclosure purchasers who are not contractually bound by any lease agreement. These tenants will be evicted even though they are not delinquent in the payment of rent or in default under the terms of the lease agreement.[83] In these jurisdictions, the tenancy can be automatically terminated upon foreclosure of the leased premises.[84] These jurisdictions view foreclosures and evictions as separate actions with no cross claims or complementary rights.[85]

Previously, in common law jurisdictions, tenants found themselves in no-win situations because residential leases were not likely to have priority over mortgages for two reasons. First, most recording statutes did not require and/or permit residential leases to be recorded.[86] Second, most landlords had their mortgages in place before they leased to tenants. Also, tenants were not likely to ask for, and lenders are not likely to enter into, a subordination agreement with a tenant. Thus, most residential leases were subordinate to mortgages.[87] As such, a foreclosure sale served to wipe out any such leases, allowing the foreclosure purchaser to take the property free and clear of any subordinate

---

Joseph W. McQuade, Note, O'Brien Properties, Inc. v. Rodriguez*: Upholding Statutory Eviction Protection for Elderly, Disabled and Blind Tenants in Connecticut*, 24 CONN. L. REV. 599 (1992).

81. *See, e.g.*, First Nat'l Bank v. Welch, 132 So. 44, 45 (Ala. 1930) (holding that "[t]he lease was subsequent to and subject to the mortgages, and by their foreclosure the lease under which the defendant held was abrogated and the tenant was subject to ouster at the will of the purchaser at the foreclosure sale, the landlord in the broad sense of ownership").

82. *See generally* Grant S. Nelson & Dale A. Whitman, *Foreclosure*, *in* REAL ESTATE FINANCE LAW 7.2 (2007).

83. John Leland, *The Rent Is All Paid Up, but Eviction Still Looms*, N.Y. TIMES, May 2, 2009, at A9, *available at* http://www.nytimes.com/2009/05/02/us/02renters.html?_r=2.

84. 50-STATE REVIEW, *supra* note 7, at 7.

85. *Id.* at 6-8.

86. Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1478 (2004) (pointing out that "[i]n most jurisdictions . . . leases that do not exceed some stated term . . . are not within the scope of recording acts"); *see, e.g.*, CAL. CIV. CODE § 1214 (West 2007) (leases greater than a year); N.C. GEN. STAT. ANN. § 47-18(a) (West 2000 & Supp. 2009) (leases three years or longer); WASH. REV. CODE ANN. § 65.08.060(3) (West 2005) (leases greater than two years); W. VA. CODE ANN. § 40-1-8 (West 2002) (leases longer than five years).

87. *See generally Effect of Foreclosure of Mortgage as Terminating Lease*, *supra* note 26.

rights, including the right of possession of the tenant.[88]

2. Nature of the Landlord-Tenant Relationship.—A property owner may carve out a portion of his estate to create a tenancy.[89] To create a tenancy, the property owner transfers the right of occupancy and use to the tenant for a length of time.[90] This transfer creates the landlord-tenant relationship. The landlord retains "ownership" of the property, but may not occupy the premises.[91] The landlord impliedly or expressly agrees to not disturb the tenant's use, occupancy, and enjoyment of the leased premises until the lease term terminates.[92] If the landlord interrupts the tenant's use, occupancy, and enjoyment of the leased premises, then the landlord may be liable for damages to the tenant.[93]

On the other hand, when a landlord property owner signs a mortgage to a lender (mortgagee), the legal interest given to the lender depends on whether the property is in a "title theory" or "lien theory" state.[94] In a title theory state, the legal title, actual ownership, to the property is transferred to the lender until the mortgage is satisfied or foreclosed upon.[95] However, in a lien theory state, the lender merely retains a lien, or security, on the property but has no title.[96]

What happens in common law jurisdictions when a mortgagor defaults on a mortgage? In both "title theory" and "lien theory" states, the lender is immediately vested with legal ownership in the mortgaged property.[97] Accordingly, the legal ownership permits the lender to take immediate possession and oust the mortgagor or other third parties in possession.[98] This means that

---

88. *Id.*; West 56th & 57th St. Corp. v. Pearl, 662 N.Y.S.2d 312 (App. Div. 1997) (finding that a lis pendens in foreclosure provides constructive notice to any tenancy created after the notice).

89. 52 C.J.S. *Landlord* § 2.

90. *Id.*

91. *Id.* § 506.

92. Ianello v. Court Mgmt. Corp., 509 N.E.2d 1, 2 (Mass. 1987).

93. *Id.*

94. The following analysis does not apply to federally subsidized housing (section 8), rent stabilized, or rent controlled housing, or to situations where tenants have signed a subordination, non-disturbance, and attornment agreement with the mortgagee.

95. Nelson & Whitman, *supra* note 82, § 1.5. In a title theory state, the borrower actually conveys the title of the property to the lender typically through an instrument like a Security Deed. If the debtor defaults, the lender could technically demand possession of the premises through strict foreclosure, but will typically seek to foreclose. *See, e.g.*, *In re* Willette, 395 B.R. 308, 316 (Bankr. D. Vt. 2008).

96. Nelson & Whitman, *supra* note 82, § 1.5. In lien theory states, the mortgagor has full ownership rights in the property until foreclosure. Thus, if the mortgagor defaults, a lender does not have any rights to any rents until a foreclosure is complete. *Id.* § 4.23.

97. *See, e.g.*, CONN. GEN. STAT. ANN. § 49-17 (2006) (stating that "[w]hen any mortgage is foreclosed by the person entitled to receive the money secured thereby but to whom the legal title to the mortgaged premises has never been conveyed, the title to such premises shall, upon the expiration of the time limited for redemption and on failure of redemption, vest in him. . .").

98. *See* Malamut v. Haines, 51 F. Supp. 837, 843 (M.D. Pa. 1943) ("The remedy of the mortgagee, after default of the mortgagor is to foreclose and extinguish the inferior lease or bring

lenders hold a superior right of possession, which is higher over any other parties', including tenants who have complied with their lease agreements. Tenants' rights are subordinate to the lender's rights because a tenant derives his right of occupancy and use from his or her landlord. If a landlord no longer has the legal right of occupancy and use in the leased premises, then his or her tenant's rights are nullified as well, allowing the foreclosure purchaser to evict tenants.

On the other hand, if tenants were prior in time, then a tenant's right of occupancy and use is superior to the lender.[99] In *Gorin v. Stroum*, the Massachusetts Supreme Judicial Court stated:

> It is well settled . . . that the rights of a tenant in possession of real estate, under a lease given prior to the execution of a mortgage on the same premises, are not extinguished by a foreclosure of the mortgage, and that the purchaser at a foreclosure sale acquires no greater interest than the mortgagor had, and with the sale becomes the landlord of the lessee.[100]

As the *Gorin* case illustrates, a tenant's right of possession does not prevent a lender's right to foreclose upon mortgagee default, but it creates a new relationship between the tenant and lender: landlord and tenant.[101] Upon foreclosure, any purchaser at a foreclosure sale would take the purchased property subject to the tenant's rights as defined by the lease agreement.[102] Thus, after the foreclosure, the tenant is required to pay rent to the lender upon notice.[103]

A few courts have held that lis pendens is binding on tenants if the tenancy begins after the filing of the lis pendens.[104] Generally, most purchasers have a duty to diligently inspect the premises to discover physical defects and should conduct a title search to become aware of the state of the owner's title.[105] Tenants, however, do not have the same concerns as purchasers, such as

---

ejectment."); Knickerbocker Oil Corp. v. Richfield Oil Corp. of N.Y., 254 N.Y.S. 506, 511 (App. Div. 1931).

99. Gorin v. Stroum, 192 N.E. 90, 92 (Mass. 1934).

100. *Id.* at 92.

101. *Id.*

102. *Id.*

103. *See Malamut*, 51 F. Supp. at 842.

104. Myers v. Leedy, 915 N.E.2d 133, 138 (Ind. 2009); 15 West 56th & 57th St. Corp. v. Pearl, 662 N.Y.S.2d 312 (App. Div. 1997) (finding that a lis pendens in foreclosure provides constructive notice to any tenancy created after the notice).

105. A tenant is most likely to take the word of an individual who holds himself out as a landlord that he has title to the real property and is authorized to rent the property. Landlords would probably turn away an application from a prospective tenant who demands proofs of ownership and non-default. However, local ordinances or state laws requiring landlords to provide such notice to tenants would afford tenants with the opportunity to act more prudently before entering into a lease agreement and face eviction because of their landlords' financial condition at a later date.

possessing marketable title. It is highly unlikely that a tenant will do more than a cursory inspection of the leased premises or search his or her prospective landlord's title. As such, a tenant is not likely to find any evidence of a pending foreclosure unless the landlord discloses the information. Also, much of the title work in property sales is prompted by a mortgage lender, who is not an actor in the landlord-tenant relationship. Therefore, permitting tenants to suffer the same consequences as a purchaser when it concerns notice of a pending foreclosure is unfair and produces an inequitable result.

3. Tenants' Defenses to Foreclosure Action.—In foreclosure actions, mortgagors have several defenses available to them. These defenses include: unconscionability, release, satisfaction, discharge, invalid lien, breach of contract, and prior payment.[106] When a mortgagor leases the mortgaged premises to tenants, he, as landlord, is merely transferring his right of possession, warranting that the possession will not be interrupted.[107] However, a mortgagor does not delegate any of its defenses against foreclosure to its tenant by virtue of the landlord-tenant relationship.

Some courts have rightfully noted that if tenants are joined in the foreclosure action, there are no common questions of law or facts.[108] That is, tenants have no bearing on whether the lender may foreclosure upon the property. The biggest issue in a mortgage dispute is whether the mortgagor paid the debt when due. A tenant cannot argue or prove that his or her landlord had previously satisfied the mortgage or was discharged or released. In fact, the tenant may not be privy to such facts. Likewise, a tenant may not be aware that his landlord even has a mortgage on the property at all. The question of whether the mortgagee had foreclosed is another issue unless the tenant is a requisite, necessary party to the foreclosure action.[109]

Similarly, the tenant may not have standing to assert his own rights, which vary from those of the landlord, in the foreclosure action. There are some defenses that a tenant may raise. For example, a tenant may rightfully challenge the mortgagee's right to foreclosure.[110] If the mortgagee is unable to produce a

---

106. Chase Manhattan Mortgage Corp. v. Machado, 850 A.2d 260, 264 (Conn. App. Ct. 2004). Other legal defenses against foreclosure include arguing that the foreclosing party is not a real party in interest and that there was violations of the Fair Housing Act, Pub. L. No. 90-284, tit. VIII, 82 Stat. 81-89 (codified at 42 U.S.C. §§ 3601-31 (2006), Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B) (2006), Home Ownership and Equity Protection Act, Pub. L. No. 103-325, §§ 151-58, 108 Stat. 2160, 2190-98 (codified as amended in shattered sections of 15 U.S.C.), and Fair Debt Collection Practices Act, 15 U.S.C. § 1640(a)(2)(B) (2006).

107. Ianello v. Court Mgmt. Corp., 509 N.E.2d 1, 3 (Mass. 1987).

108. *See, e.g.*, Nomura Home Equity Loan Inc. v. Vacchio, 864 N.Y.S.2d 834, 836 (Sup. Ct. 2008).

109. *See infra* Part III. Some jurisdictions do require tenants to be joined as a party to the foreclosure. *See, e.g.*, *Vacchio*, 864 N.Y.S.2d at 836. Failure to do so will cause the leasehold to remain intact, even though the lease is subordinate to the mortgage.

110. Tenants may use the "Produce the Note Defense." However, this defense will only push back the start of the foreclosure action; it may not prevent the mortgagee from foreclosing. *See*

note or otherwise prove that he or she is entitled to foreclose, then foreclosure against the property is stalled until the mortgagee can produce the note or prove his or her right to foreclose.[111]

"Any person who may have acquired any interest in the premises, legal or equitable, by operation of law or otherwise, in privity of title with the mortgagor, may redeem, and protect such interest in the land."[112] Thus, tenants have the right to redeem the property from foreclosure.[113] If a tenant pays the mortgagee the amount of the indebtedness plus costs related to the foreclosure, he or she extinguishes the mortgage and redeems the property.[114] Redemption by residential tenants, however, is not likely to happen. Most residential tenants, unlike some commercial tenants, do not have the financial means to pay off the mortgagee. Not surprisingly, a byproduct of the real estate market downfall is more stringent lending practices by financial institutions.[115] Thus, tenants may not qualify under the new mortgage standards to finance property redemption from foreclosure.

The most viable remedy is a breach of the covenant of quiet enjoyment against his or her former landlord.[116] A breach of the covenant of quiet enjoyment arises when a landlord's conduct interferes with a tenant's right of possession, "depriving the lessee of the beneficial use of the demised premises."[117] If a landlord breaches the tenant's quiet enjoyment, then a tenant is entitled to damages for the breach and injunctive relief.[118] In a foreclosure situation, a landlord is likely insolvent. Thus, the pursuit of monetary damages will most likely be fruitless. Also, the remedy of injunctive relief is inapplicable

---

Vicki Been & Allegra Glashausser, *Tenants: Innocent Victims of the Nation's Foreclosure Crisis*, 2 ALB. GOV'T L. REV. 1, 28 (2009) (rightfully asserting that "in the vast majority of situations, tenants have no defense if their property is sold at a foreclosure sale").

111. On occasion, however, courts may deny an order of foreclosure due to insufficient proof of foreclosing rights. *See, e.g.*, Bayview Loan Servicing, L.L.C. v. Nelson, 890 N.E.2d 940, 944 (Ill. App. Ct. 2008) (reversing a judgment of foreclosure because mortgagee failed to produce evidence that he or she had an interest in the real property).

112. Nelson & Whitman, *supra* note 82, § 7.2 (citation omitted).

113. *Id.*

114. *Id.* (stating that under the Restatement tenants are primarily responsible as it pertains to payoffs because the classification "is not dependant on personal liability on the debt").

115. Dina ElBoghdady, *FHA Loans Emerge from the Sidelines*, WASH. POST, June 10, 2008, at D1 (noting a 126% increase in the first quarter of 2008 in FHA loans "because they do not require the hefty down payments or stellar credit scores that lenders have come to expect from borrowers"), *available at* http://www.washingpost.com/wp-dyn/content/article/2008/06/09/AR2008060902645.html. *See also* U.S. DEP'T OF HOUS. & URBAN DEV., FHA SINGLE FAMILY ACTIVITY IN THE HOME-PURCHASE MARKET THROUGH NOVEMBER 2009 (2010), http://www.hud.gov/offices/hsg/comp/rpts/fhamktsh/fhamkt1109.pdf (estimating a 41.91% share of all new home loans).

116. *See, e.g.*, 74 N.Y. JUR. 2D, *Landlord and Tenant* § 236-37 (1999).

117. 1 AMERICAN LAW OF PROPERTY § 3.51, at 280 (1952).

118. *See, e.g.*, Andrews v. Mobile Aire Estates, 22 Cal. Rptr. 3d 832, 840 (Ct. App. 2005).

to the tenant's situation. Therefore, a tenant is left without any viable legal remedies because of the breach of the covenant of quiet enjoyment.

4. The Bad News: Tenants' Losses.—A tenant's most immediate losses associated with eviction are economic, social, and psychological. The economic harms tenants confront are the loss of relocation expenses, loss of security deposits or prepaid rents, injuries associated with being evicted, and competition for affordable housing. Moving may be extremely costly. For example, a tenant may have to hire a moving company and pay for packing materials, utility connection or transfer charges, and storage expenses. The evicted tenants might also have to miss work due to packing or moving or meeting utility companies for utility connection. In addition to these charges, the tenant may have to pay another security deposit, which is typically one month's rent or two months' rent (first and last month's rent). Due to the unexpected nature of these expenses, a tenant may not be able to afford to relocate. When a landlord is foreclosed upon, he or she takes with him or her the tenants' security deposit or prepaid rent. Presumably, a landlord may be judgment-proof or undiscoverable because the landlord was absentee or out of town.

After the foreclosure and subsequent eviction, some tenants will likely rent again. Most landlords require evicted tenants to fill out an application and will check the tenant's credit report and background, including any judgments filed against the tenant. Evictions will likely show up on one of these reports. If a tenant is evicted due to foreclosure, his or her rental history will show an eviction, but not the cause of the eviction. Prospective landlords would then assume that the eviction was due to the tenant's actions, not due to foreclosure. Consequently, the new landlord may reject the tenant's rental application. Thus, if most landlords use a reporting system to check a tenant's rental history, then the evicted tenant will have limited rental properties available to him or her.[119]

Also, due to the market meltdown, the construction of apartment complexes and condominiums has greatly decreased.[120] This leaves those who are in the greater pool of renters to contend for already built rental properties. Not only must the evicted tenants compete with other renters, they also compete with former homeowners whose homes were foreclosed.[121] Another group of renters who compete with evicted tenants are also casualties of the real estate market meltdown—those who want to purchase homes, but due to the lack of mortgage lending, they are unable to do so. In tight rental markets, especially, the struggle

---

119. *But see* MINN. STAT. ANN. § 484.014 (West 2002 & Supp. 2010). Minnesota permits a court to expunge the eviction records for tenants whose tenancies are extinguished due to foreclosure. *Id.*

120. *See* E.S. Browning, *Stock Market Pullback Isn't Just 'Financial' Now*, WALL ST. J., Feb. 23, 2009, at C1; Jack Healy, *Investors Gloomy as January Disappoints*, N.Y. TIMES, Jan. 31, 2009, at B6; Louis Uchitelle, *Economic Dive Deepens, Giving Stimulus Urgency*, N.Y. TIMES, Jan. 31, 2009, at A1.

121. June Fletcher, *The Accidental Renters, After Losing Homes to Foreclosure, Tight Rental Market Poses More Indignities*, WALL ST. J., May 2, 2008, at W8, *available at* http://online.wsj.com/article/SB120968084136860893.html.

to find acceptable and affordable housing is nearly impossible.

Again, this current market has wreaked havoc in many ways. Many landlords entered the rental market unwillingly. When the market was "booming," a great number of investors purchased real estate to "flip" the property.[122] In a number of cases, investors had multiple pieces of property to flip for a quick profit. When the market cooled, investors found themselves in a quandary, holding several properties without the ability to flip the property quickly.[123] As a result, some investors unwilling entered into the rental market to preserve their economic integrity.[124] Because many of the investors were amateur flippers, the market had detrimental economic effects on these landlords. Thus, they were unlikely to have the necessary funds to preserve the condition of the rental properties.

The battle is not necessarily the giant, rich Goliath—the landlord—against the poor, puny David—the tenant. Not all landlords are rich and not all tenants are poor. However, what is true is that tenants are not wrongdoers in foreclosures, yet they are forced to sacrifice their "homes" due to another's wrongdoing. One author stated that "Home Sweet Home didn't lose its sweetness because someone else [holds] the title."[125] A tenant has a legally recognizable interest in the property that allows him to exclude third parties and even the landlord.[126] Thus, he has all of the aspects of home ownership minus the title. To him, his rental property is his castle, his home. Therefore, loss of his home has psychological ramifications.

> Sanctity of the home has been a powerful ideal in the American legal tradition. The home not only provides the basic necessity of shelter but is also central to an individual's emotional and personal life. The intangible connection between an individual and her home is not limited to homeowners. For tenants as well an involuntary removal from the home can be devastating, depriving the tenant of both physical and emotional security.[127]

Undoubtedly, tenants, like homeowners, become a part of the community in which they live. When tenants are involuntarily removed, the result may also include loss of their community. Many times, tenants also lose their privacy because their most personal belongings are exposed to the community if their personal property was placed on the street upon eviction. Additionally, families with school-aged children may have to change to a different school district, which creates a loss of stability.

Not only are tenants harmed, their neighbors may also be detrimentally

---

122. *See* Julia Dahl, *Flippers Sweat to Avoid Flop*, REAL DEAL, June 30, 2008, *available at* http://therealdeal.com/newyork/articles/flippers-sweat-to-avoid-flop.

123. *Id.*

124. *See id.*

125. Sugrue, *supra* note 25.

126. *See* 52 C.J.S. *Landlord* § 506 (2010).

127. Bell, *supra* note 31, at 483.

affected by foreclosures. Dan Immergluck and Geoff Smith say that, since the 1960s, "foreclosures of single-family homes (one- to four-unit) have been viewed as a serious threat to neighborhood stability and community well-being."[128] Many communities being decimated by foreclosures due to abandoned homes are in African American and Hispanic communities.[129] "People instinctively understand that homeownership conveys good feelings about belonging in our society, and that such feelings matter enormously, not only to our economic success but also to the pleasure we can take in it."[130]

Most foreclosed properties remained abandoned for extended periods. Abandoned homes are more susceptible to vandalism, disrepair, and economic harm to the neighboring properties. Neighboring property values are reduced by .9% to 1.1% by each foreclosure.[131] Additionally, foreclosures may create health risks to those within the vicinity of the foreclosure. Studies have shown that foreclosures increase the incidence of violent crimes in the area by six to seven percent.[132] Similarly, foreclosed homes with swimming pools, ponds, or hot tubs have become breeding grounds for mosquitoes, which could potentially transmit the West Nile virus to neighbors.[133] To curtail the potential of devastating health epidemics, some states have attempted to address this issue via its mosquito abatement programs.[134]

B. Tenancy Survives Foreclosure

Jurisdictions like New Jersey, New York, and the District of Columbia have strict eviction rules for landlords.[135] In these jurisdictions, tenants may not be

---

128. Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUS. POL'Y DEBATE 57, 59 (2006), *available at* http://semcog.org/uploadedFiles/hpd_1701_immergluck.pdf.

129. *See, e.g.*, Erik Eckholm, *Foreclosures Force Suburbs to Fight Blight*, N.Y. TIMES, Mar. 23, 2007, A1, *available at* http://www.nytimes.com/2007/03/23/us/23vacant.html; Patrik Jonsson, *Vacant Homes Spread Blight in Suburb and City Alike*, CHRISTIAN SCI. MONITOR, July 2, 2008, *available at* http://www.csmonitor.com/2008/0702/p01s01-usgn.html; Gene Sperling, *Subprime Mortgage Meltdown Renews Urban Blight*, BLOOMBERG, Mar. 19, 2008, http://www.bloomberg.com/apps/news?pid=newsarchive&refer=columnist_sperling&sid=ats13kQUUEBK.

130. Robert J. Shiller, *The Scars of Losing a Home*, N.Y. TIMES, May 18, 2008, at B05, *available at* http://www.nytimes.com/2008/05/18/business/18view.html.

131. Immergluck & Smith, *supra* note 128, at 68-69; *but see* Been, *supra* note 3, at 34 (stating that once there is a certain number of foreclosures in an area, the impact of subsequent foreclosures on property values is reduced).

132. Immergluck & Smith, *supra* note 128, at 59.

133. *See* David Streitfeld, *Blight Moves in After Foreclosures*, L.A. TIMES, at A1, Aug. 28, 2007 (stating that California's mosquito abatement programs have treated vacant homes to prevent the spread of the West Nile Virus and noting that seven residents had died from the virus by the date of article publication).

134. *Id.*

135. *See* D.C. CODE § 42-3505.01 (Supp. 2009); N.J. STAT. ANN. § 2A:18-61.1(West Supp.

evicted unless the landlord has "good" or "just" cause for the eviction. New Jersey's Anti-Eviction Act[136] is the most comprehensive statute and provides the most protection to tenants. In New Jersey, "[n]o lessee or tenant . . . may be removed by the Superior Court from any house . . . or tenement leased for residential purposes . . . except upon establishment of one of the . . . grounds as good cause."[137] The Anti-Eviction Act enumerates eighteen grounds as good cause for eviction.[138] If the landlord does not prove one of the enumerated causes, then the tenant may remain in possession. The New Jersey Supreme Court held in *Chase Manhattan Bank v. Josephson* that foreclosing mortgagees are subject to the Anti-Eviction Act.[139]

Several cities in California have enacted "just cause" eviction laws to prevent foreclosing mortgagees or new owners from evicting tenants.[140] These cities include Berkeley, Beverly Hills, East Palo Alto, Glendale, Hayward, Los Angeles, Maywood, Oakland, Palm Springs, San Diego, San Francisco, Santa Monica, and West Hollywood.[141] Thus, localities may join in guarding tenants against the injustice of foreclosure.

C. Tenants Must Be Provided with Notice Prior to Foreclosure and/or Made a Party to the Foreclosure Action

The NLCHP found that seventeen states require that tenants be provided notice of the foreclosure proceedings or at least be provided with notice of the landlord's default.[142] These states include Alaska, California, Colorado, Idaho, Iowa, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nevada, New York, North Carolina, Oregon, Pennsylvania, and Washington.[143] The NLCHP also found that twelve states require that tenants be named as parties to the foreclosure action.[144] These states include Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Maine, Missouri, New York, Ohio, Vermont, and Wisconsin.[145] In these jurisdictions, tenants must be made a party of the foreclosure action or provided with notice in order to affect or terminate the tenancy.[146] If a tenant is

---

2010); 9 N.Y. COMP. CODES R. & REG. tit. 9, § 2104.6 (2010).

136. N.J. STAT. ANN. § 2A:18-61.1.

137. *Id.*

138. *Id.*

139. Chase Manhattan Bank v. Josephson, 638 A.2d 1301, 1309 (N.J. 1994); *see also* Sec. Pac. Nat'l Bank v. Masterson, 662 A.2d 588, 591 (N.J. Super. Ct. Ch. Div. 1994).

140. TENANTS TOGETHER, HIDDEN IMPACT: CALIFORNIA RENTERS IN THE FORECLOSURE CRISIS (Mar. 2009), *available at* http://www.tenantstogether.org/downloads/ForeclosureReport.pdf.

141. *Id.* at 8 n.9.

142. 50-STATE REVIEW, *supra* note 7, at 7.

143. *Id.* at 7 n.1.

144. *Id.* at 7.

145. *Id.* at 7 n.2.

146. *Id.* at 7.

not named as a defendant in the foreclosure action, then the tenancy survives.[147] Likewise, "[t]he interest of an occupant of the mortgaged premises who is not served remains unaffected by the foreclosure."[148]

The reason these jurisdictions required the foreclosing mortgagee to join tenants to, or supply tenants with, notice of the foreclosure is because of due process concerns. "Due process requires that one be given notice and an opportunity to be heard before one's interest in property may be adversely affected by judicial process."[149] Wisconsin requires plaintiffs in foreclosure actions to provide tenants in possession with notice of: (1) filing of foreclosure action, not later than five days after commencement of the foreclosure action; (2) judgment of foreclosure, not later than five days after judgment of foreclosure is entered; and (3) date and time of hearing, when the confirmation of sale is scheduled.[150]

The rule that tenants should be joined is not a compulsory rule:

> Although it was not incumbent upon [a foreclosing party] to join this tenant whose tenancy began after the foreclosure action commenced . . . by not doing so, [the tenant's] interest is not affected by the judgment of foreclosure and the purchase[r] takes title subject to any rights, title or interest which the tenant is able to establish.[151]

There may be reasons why a foreclosing party would want to exclude a tenant from the foreclosure. The main reason is that the foreclosing party wants to

---

147. *See* Nomura Home Equity Loan Inc. v. Vacchio, 864 N.Y.S.2d 834, 836 (Sup. Ct. 2008); SI Bank & Trust v. Sheriff of City of N.Y., 751 N.Y.S.2d 794, 794 (App. Div. 2002) (stating that in order to terminate the interest of one who is an occupant of a property prior to the foreclosure, that occupant must be named as a defendant and if not so named, the tenancy survives the foreclosure); Mortgage Elec. Registration Sys., Inc. v. Anuforo, No. 137181106, 2007 WL 1191626, at *2 (N.Y. App. Div. Apr. 17, 2007); Nationwide Assocs., Inc. v. Brunne, 629 N.Y.S.2d 769, 769 (App. Div. 1995); *see also* Myers v. Leedy, 915 N.E.2d 133, 137 (Ind. 2009); Ellveeay Newspaper Workers' Bldg. & Loan Ass'n v. Wagner Mkt. Co., 166 A. 332, 333 (N.J. 1933); Prudence Co. v. 160 West Seventy-Third St. Corp., 183 N.E. 365, 367 (N.Y. 1932); Metro. Life Ins. Co. v. Childs Co., 130 N.E. 295, 297 (N.Y. 1921); Bushe v. Wolff, 171 N.Y.S. 253, 255 (1918); Greenwald v. Schustek, 169 N.Y.S. 98, 99 (1918); Virges v. E. F. Gregory Co., 166 P. 610 (Wash. 1917); Zimmermann v. Walgreen Co., 255 N.W. 534, 537 (Wis. 1934) (finding that termination of a lease by a foreclosure action depends "on the joinder of the lessee as a party to the foreclosure action").

148. Genuth v. First Div. Ave. Realty Corp., 387 N.Y.S.2d 793, 794 (Sup. Ct. 1976); Empire Sav. Bank v. Towers Co., 387 N.Y.S.2d 138, 139 (App. Div. 1976) (citing Douglas v. Kohart, 187 N.Y.S. 102, 105 (App. Div. 1921)); *see also In re* Comcoach Corp., 698 F.2d 571, 574 (2d Cir. 1983); Scharaga v. Schwartzberg, 540 N.Y.S.2d 451, 452-53 (App. Div. 1989); Polish Nat'l Alliance of Brooklyn, USA v. White Eagle Hall Co., 470 N.Y.S.2d 642, 648 (App. Div. 1983).

149. Gibbs v. Kinsey, 566 N.Y.S.2d 117, 117 (App. Div. 1991).

150. WIS. STAT. ANN. §846.35(1)(a) (West Supp. 2009).

151. Green Point Sav. Bank v. Defour, 618 N.Y.S.2d 169, 171 (Sup. Ct. 1994) (citation omitted).

preserve the tenancy. After the foreclosure, and upon notice, the tenant would be required to pay rent to the new owner, the purchaser at the foreclosure sale.[152]

Many times tenants are unaware that their landlords are foreclosed upon. They quickly find out when their utilities are turned off or when the sheriff knocks on the door with a notice of eviction.[153] In jurisdictions where tenants are obligated to give notice to or join tenants as parties, the element of surprise is eliminated. Tenants have potentially more time to find alternative housing during the pendency of the foreclosure. Assumedly, however, most tenants knowing that a foreclosure sale is imminent feel the urgency to move as soon as possible instead of remaining on the property waiting to be kicked out.

IV. REFORMATION CHOICES

A. Modification of the Eviction Processes Under Residential Landlord and Tenant Acts

Most state residential landlord and tenant acts set forth numerous rights and duties that exist between a landlord and tenant.[154] For example, tenants have the right to a habitable dwelling, privacy, quiet enjoyment, and return of security deposits. Should a landlord or party with superior rights interfere with any of the above rights, a tenant may have a remedy to vacate the premises or withhold rent. However, a vast number of jurisdictions do not set forth any legal remedies that tenants would have against a foreclosing purchaser for disturbing tenants' rights because a foreclosing purchaser is not a party to the contract with the tenant, and the landlord-tenant acts do not apply to these types of relationships.[155]

The current foreclosure crisis demonstrates that there is a critical need to revolutionize the "step-child" of the law, landlord-tenant law. The revolution could include the definition or expansion of the rights and duties of the parties in the aftermath of the foreclosure of rental property. The PTFA leaves open the question of which rights, if any, are enforceable after the foreclosure sale.[156] Assuming that tenants are permitted to remain in the leased premises until the end of the lease term, then tenants have a duty to pay rent to foreclosing purchasers and not commit waste. However, because the PTFA does not explicitly state that tenants have these rights and duties, the ability to enforce is questionable at best. Reforming residential landlord-tenant acts would benefit both tenants and new owners because it would outline both parties' rights and duties and provide an avenue for enforcement.

---

152. The purchaser at the foreclosure sale is typically the lender/mortgagee. After the purchase, the mortgagee becomes the tenant's landlord.

153. *See generally* Leland, *supra* note 83 (suggesting that most renters say they never knew their buildings were heading for foreclosure).

154. Tenants Rights, http://portal.hud.gov/portal/page/portal/HUD/topics/rental_assistance/tenantrights (last visited June 10, 2010).

155. *See generally Effect of Foreclosure of Mortgage as Terminating Lease*, *supra* note 26.

156. Pub. L. No. 111-22, Div. A, Title VII, 123 Stat. 1660.

At present, a majority of eviction statutes do not refer to foreclosure specifically. The state eviction statutes that mention the term "foreclosure" are: Delaware,[157] Iowa,[158] Kansas,[159] Massachusetts,[160] Michigan,[161] Minnesota,[162] Missouri,[163] Nevada,[164] New Jersey,[165] New York,[166] Texas,[167] Virginia,[168] Wisconsin,[169] and Wyoming.[170] Of the state statutes that do mention foreclosure, Minnesota, New Jersey, and New York's eviction statutes offer the most protection to tenants.[171] Other states can learn from the successes of these three jurisdictions.

For example, the Minnesota legislature has set forth several defenses against eviction for tenants. The eviction process is limited in scope and summary in nature in Minnesota.[172] It only allows a tenant to dispute a claimant's "right to possession but not to litigate disputed issues of ownership."[173] If a tenant desires to litigate issues relating to the foreclosure, he must initiate an independent action.[174] The foreclosing party is entitled to recover the mortgaged property by eviction after providing at least two months notice to vacate to a tenant after the expiration of the redemption period and if the foreclosure is not based on a retaliatory reason.[175]

Along with stricter eviction procedures, these jurisdictions have set forth mechanisms, which provide maximum protections to tenants, which are potentially invaluable during the foreclosure process. The strict procedures and these stronger protections appear to go hand in hand. There are several recommendations to protect tenants through the eviction process based on public policy. First, states could create separate courts that deal solely with housing

---

157. DEL. CODE ANN. tit. 25, § 5702(6) (2006).

158. IOWA CODE ANN. § 648.1(4) (West Supp. 2010).

159. KAN. CIV. PROC. CODE ANN. STAT. ANN. § 60-1006 (West 2005).

160. MASS. GEN. LAWS ANN. ch. 186, § 13 (West Supp. 2010).

161. MICH. COMP. LAWS ANN. § 600.574 (West 1996).

162. MINN. STAT. ANN. § 504B.285 (West Supp. 2010).

163. MO. ANN. STAT. § 534.030 (West Supp. 2010); MO. ANN. STAT. §530.070 (West Supp. 2010).

164. NEV. REV. STAT. ANN. § 40.255(1)(b) (West 2010).

165. N.J. STAT. ANN. § 2A:18-57 (West Supp. 2010).

166. N.Y. REAL PROP. ACTS § 721(3) (McKinney 2009).

167. TEX. PROP. CODE ANN. § 24.002(a), (b) (Vernon 2000).

168. VA. CODE ANN. § 8.01-129 (West Supp. 2007).

169. WIS. STAT. ANN. § 704.31 (West Supp. 2009).

170. WYO. STAT. ANN. § 1-21-1002(a)(11) (2007).

171. MINN. STAT ANN. § 504B.285 (West Supp. 2010); N.J. STAT. ANN. § 2A:18-57 (West Supp. 2010); N.Y. REAL PROP. ACTS § 721(3) (McKinney 2010).

172. JBI & Assocs., Inc. v. Soltan, No. A05-1031, 2006 WL 1229484, at *3 (Minn. Ct. App. May 9, 2006).

173. *Id.*

174. *Id.*

175. MINN. STAT. ANN. § 504B.285(1) (West Supp. 2010).

concerns. Ohio, Massachusetts, Minnesota, and New York all have housing courts, which deal solely with landlord-tenant issues.[176] In New York City, one of the busiest cities dealing with landlord-tenant matters, a housing court may hear more than 300,000 cases annually.[177] The sheer number of cases would completely overwhelm a local civil court docket. As it stands now, the housing court judges are some of the busiest courts in the world.[178]

Most tenants are unrepresented by legal counsel in a typical landlord-tenant case. These tenants might be intimidated by or untrusting of the legal process. Housing court judges will likely anticipate this lack of counsel and provide a supportive environment.[179] In Harlem, the stated purpose of the housing court is "to achieve speedier and more durable outcomes to housing litigation while simultaneously addressing many of the underlying problems that give rise to housing cases."[180] A housing court helps accomplish these objectives because "the court is designed to help the judge gain a comprehensive understanding of local issues and concerns: it is staffed by a single judge and handles cases only from a limited geographic area. It also seeks to provide the judge with access to comprehensive and up-to-date information."[181]

Foreclosure profoundly affects a community. Some communities are affected more than others. As stated earlier, a housing court is designed to help a judge understand the local issues and concerns. Housing courts will undoubtedly work hand in hand to improve local communities. A judge with his finger on the pulse of the community will be able to determine which remedy is best for all of the parties involved in the foreclosure aftermath, particularly tenants. Not only might tenants receive greater protections, even though they are not represented by legal counsel, but also the community as a whole stands to gain by preventing empty, abandoned homes.

Second, states could set up more local tenant resource centers to offer free counseling to tenants (and landlords) with rental issues. A resource center will

---

176. *See* FAQ's About Housing Court, http:/www.Clevelandhousingcourt.org/hc_faq_a.html (last visited June 11, 2010); Housing Court Department, http://www.mass.gov/courts/courtsandjudges/courts/housingcourt/index.html (last visited June 11, 2010); Housing Court, http://www.courts.state.mn.us/district/4/?page=128 (last visited June 11, 2010); New York City Housing Court, http://www.courts.state.ny.us/courts/nyc/housing/index.shtml (last visited June 11, 2010).

177. RASHIDA ABUWALA & DONALD J. FAROLE, JR., THE EFFECTS OF THE HARLEM HOUSING COURT ON TENANT PERCEPTIONS OF JUSTICE 1 (2008), *available at* http://www.courtinnovation.org/_uploads/documents/Harlem_Housing_Court_Study.pdf.

178. On its website, the New York City Civil Court Housing Part proclaims that it is one of the busiest courts in the world. It handles "over 300,000 residential cases" every year. New York Housing Court, http://www.courts.state.ny.us/courts/nyc/housing/index.shtml (last visited May 23, 2010).

179. ABUWALA & FAROLE, *supra* note 177, at 13 (reporting that most tenants surveyed felt that the process and judges in the housing court were fair and equitable).

180. *Id.* at 2.

181. *Id.*

serve to close the gaps of knowledge concerning leasing laws. So not to require additional financial resources, attorneys could be given pro bono credit for participating at these centers. Both landlords and tenants will be able to seek advice on their rights and responsibilities concerning their lease agreements. Resource centers will point tenants in the right direction concerning housing topics, including security deposits, rent, warranties, and evictions. Unlike those jurisdictions with no aid for tenants, tenants in these jurisdictions will be able to navigate the choppy waters of eviction with the aid and counsel of a resource center. After the eviction, if allowed to proceed, a resource center could also assist displaced tenants.

Third, legislatures could set up local housing trust funds. President George W. Bush created the National Housing Trust Fund as a part of the Home and Economic Recovery Act of 2008.[182] The National Housing Trust Fund will "provide communities with funds to build, preserve, and rehabilitate [affordable] rental homes."[183] Local housing trust funds could more effectively address local needs and issues.

Fourth, states could include tenants' security deposits in the purchase price to be repaid by the mortgagee. When a mortgagee evicts a tenant after foreclosure, a tenant must not only face the heavy financial burden of finding alternative housing, but he or she also loses the financial investments made to the home and security deposits. A landlord under a state's residential landlord and tenant act has the duty to refund a tenant's security deposit beyond ordinary wear and tear.[184] However, when eviction based on foreclosure is the cause for the termination of the leasehold, tenants are usually unable to recoup their security deposits. The landlord is likely insolvent and would be judgment-proof should a tenant decide to sue. If a court provides in its eviction procedures that a foreclosure purchaser has to repay the security deposit, less costs for any impermissible damage, then a tenant may have the financial means to start another tenancy.

Fifth, in addition to the loss of their security deposits, tenants face other economic losses associated with eviction. Many times evictions do not occur at the end of a rental period. For instance, suppose that a tenant has paid rent for the month of July on July 1 and the party entitled to possession of the leased premises post eviction sends notice to vacate by July 13. Under these circumstances, the tenant is out of pocket at least half a month's rent.

Suppose again that a tenant is aware that foreclosure is impending, but the landlord convinces the tenant that he or she is working with the lender to "clear this matter up" and the tenant continues to pay rent. If the tenant pays rent for July and August, the financial devastation to him or her upon eviction is undeniably great. In order to protect a tenant in this position, legislatures should

---

182. Pub. L. No. 110-289, 122 Stat. 2654 (2008).

183. *See* National Low Income Housing Coalition—National Housing Trust Fund, http://www.nhtf.org/template/page.cfm?id=40 (last visited May 23, 2010).

184. Aleatra P. Williams, *Insurers' Rights of Subrogation Against Tenants: The Begotten Union Between Equity and Her Beloved*, 55 DRAKE L. REV. 541, 578 (2007).

permit tenants to put rent in escrow if they are aware of the foreclosure and allow tenants to use these escrow funds to assist them in moving if they are not permitted to stay.

Sixth, as stated earlier, tenants are screened for criminal backgrounds and prior evictions.[185] If a mortgagee evicts a tenant based on foreclosure on the landlord's mortgage, then any background screening would show this eviction and would negatively impact the tenant's chances of being a qualified renter. To protect tenants, states should allow tenants to expunge the eviction from their rental record.

Seventh, reforming the eviction statutes permits a state to halt evictions after foreclosure until the end of the lease term so long as the tenant remains in good standing under the terms of the lease agreement. Mortgagees who are or should be aware of a tenancy will still be able to market and sell the premises, but the closing must be extended until the end of the lease term. It could also become regular practice to require mortgagors to disclose whether the property has a current tenancy. Mortgagees could also expressly prohibit mortgagors from leasing the premises during the life of the mortgage. If there is no prohibition against renting the property, upon foreclosure, a mortgagee or the foreclosure purchaser will be entitled to all rent payments under the lease agreement until the end of the lease term.

This solution makes all of the innocent parties winners. The lender wins because he or she maintains the right to transfer or dispose of the property, though it is somewhat restricted. The lender also is able to reap the benefits of receiving payment until the property is transferred. This is a definite advantage for lenders or mortgage purchasers considering that the average time to sell a home may take 172 days or more.[186]

Finally, states could grant tenants the right to remain in the leased premises for at least six months after foreclosure. If the lease term just began, six months should be enough to give tenants adequate time to find comparable property, provided that there are other checks in place, such as counseling or relocation assistance from a housing trust.

B. Reformation of Foreclosure Procedures to Protect Tenants

Most foreclosure laws do not mention tenants. Thus, tenants typically do not have rights in the foreclosure action. Recently, however, because of the impact of foreclosure on tenants, several states have attempted to modify their statutes to provide tenants with some protection in the foreclosure process.[187] The basis

---

185. *See supra* Part II.A.

186. *See, e.g.*, BARB SCHWARTZ, STAGING TO SELL: THE SECRET TO SELLING HOMES IN A DOWN MARKET, at xiii (2009) (noting that un-staged homes can take 187 days or more to sell, if they sell at all).

187. *See, e.g.*, Illinois, H.R. 3863, 96th General Assem., Reg. Sess. (Ill. 2009) (amending Code of Civil Procedure by providing mortgagors with instructions in the residential mortgage foreclosure summons to homeowner to give written notice to any tenant about the pending

of these protections is to provide notice to tenants before the foreclosure sale or eviction.

Over the last two years, a majority of states have attempted to implement legislation to determine what kind of notice and how much notice a tenant should receive.[188] There exist various types of notice that one could provide to a tenant

---

foreclosure action and to notify the tenant of his/her right to remain on the premises); Indiana, H.R. 1081, 116th General Assem., 1st Reg. Sess. (Ind. 2009) (recommending that the mortgagee provide tenant with notice of the foreclosure action no later than ten days after the filing of the foreclosure complaint); Massachusetts, S.B. 1609, 186th Gen. Assem., Reg. Sess. (Mass. 2009) (enumerating just cause for tenant evictions, excluding foreclosures); and Nevada, S.B. 140, 75th General Assem., Reg. Sess. (Nev. 2009) (requiring landlords to notify potential tenants if a property is subject to foreclosure, provides notice to tenants that a property is subject to notice of sale, allows a tenant to remain on a foreclosed property for up to sixty days after the foreclosure sale, mandates tenants pay rent to the new owner, and permits new owner/landlord to negotiate a new lease with an occupying tenant).

188. S. 245, 2009 Legis., Reg. Sess. (Ala. 2009) (providing tenants with ninety days notice before the foreclosure sale); H.R. 108, 26th Legis., 1st Sess. (Alaska 2009) (advocating that tenants be notified ten days after recordation of notice of default); S. 1108, 48th Legis., 2d Reg. Sess. (Ariz. 2008) (supporting thirty days notice before notice of eviction is filed); S. 1646C1, 2009 Legis., Reg. Sess. (Fla. 2009) (supporting thirty days notice before notice of eviction is filed); H.R. 443, 25th Legis., Reg. Sess. (Haw. 2009) (suggesting that the landlord should notify tenant of foreclosure and notice should be given thirty days before foreclosure sale); L.D. 148, 124th Legis., 1st Reg. Sess. (Me. 2009) (endorsing a plan which mails notice to tenant no later than fourteen days after commencement of foreclosure action); S. 823, 2009 Gen. Assem., Reg. Sess. (Md. 2009) (advancing a system of notice to tenant no later than thirty days before the foreclosure sale); S. 32, 95th Legis., Reg. Sess. (Mich. 2009) (suggesting that an occupant be given notice within fifteen days of first publication of notice of foreclosure); H.R. 753, 95th General Assem., 1st Reg. Sess. (Miss. 2009) (attempting to implement a rule of ninety days notice of eviction to tenant before foreclosure sale date); H.R. 4063, 213th Leg., Reg. Sess. (N.J. 2009) (proposing that new owner give tenant five days notice after foreclosure sale); H.R. 2703, 2009 General Assem., 2009-10 Reg. Sess. (N.Y. 2009) (recommending that tenants receive notice ten days after commencement of non-judicial action and not less than ten days before first notice of sale); S. 13, 128th General Assem., Reg. Sess. (Ohio 2009) (advocating that the court clerk alerts a resident within seven days of issuing a summons for service); S. 952, 75th Legis. Assem., 2009 Reg. Sess. (Or. 2009) (stating that the landlord must provide a tenant with notice of a foreclosure within the lease); S.B. 952, 75th Legis. Assem., Reg. Sess. (Or. 2009) (requiring sixty days notice to month to month tenants who lived in the residence for more than one year); H.R. 5137, 2009 General Assem., Jan. Sess. (R.I. 2009) (preventing new owners from evicting tenants for at least sixty days after foreclosure sale); H.R. 5177, 2009 General Assem., Jan. Sess. (R.I. 2009) (proposing that plaintiffs provide notice at least thirty days prior to first publication of foreclosure); H.R. 1394, 2009 Gen. Assem., Reg. Sess. (Tenn. 2009) (recommending that the mortgagee notify the tenant at least thirty days before foreclosure sale); H.R. 2080, 2009 General Assem. (Va. 2009) (proposing that the landlord give notice of default, acceleration of mortgage debt or notice of foreclosure sale within five business days of written notice from lender); S. 5810, 61st Leg., 2009 Reg. Sess. (Wash. 2009) (advocating a scheme of providing tenant with notice of foreclosure by trustee); S. 78, 2009-10 Leg. Sess. (Wis.

who lives in property undergoing foreclosure. One could provide tenants with either the notice of the default by their landlord, notice of the foreclosure sale date, notice of new ownership, or notice of eviction. Jurisdictions have grappled with which notice offers the most protection to tenants.[189]

Legislators have three parties from which to choose who should supply notice to a tenant. First, legislatures could require the landlord to provide the notice to the tenant. This is optimal because the tenant's adversity is due to his relationship with the landlord. The landlord also best knows how to get in contact with the tenant based on the lease agreement. Additionally, the landlord will receive notice of default and foreclosure from the lender. These events should prompt the landlord's duty to disclose this information to the tenant.

Second, a legislature may also require the plaintiff/mortgagee to give the tenant notice of the impending foreclosure sale or eviction. Many foreclosure statutes require the mortgagee to provide notice to his or her mortgagor or persons of interest in the real property.[190] This notice requirement does not necessarily extend to tenants.

Third, legislatures may require the purchaser at the foreclosure sale to provide notice to the tenant of the sale and impending eviction. However, the foreclosure purchaser should not be required to provide notice of an imminent sale because he or she was simply a bystander until the sale. If the lender/mortgagee is also the foreclosure purchaser, then his or her duty to provide notice of the foreclosure sale to the tenant is under that role.

What does notice do for a tenant? Notice may eliminate the surprise of eviction. However, notice does not provide any palpable remedies to a tenant. Notice does not give a tenant any economic benefit, such as a return of his or her security deposit, investment in the property or lost rent payments. Additionally, notice does not help a tenant afford the costs associated with the displacement from one's community or storage fees from being evicted. Likewise, notice does not preserve a tenant's reputation as a good, paying tenant. It is not the foreclosure that directly harms the tenant. What harms the tenant is the consequences and sting of eviction. Therefore, notice will not eliminate these penalties.

There are three possible modifications of state foreclosure laws to increase tenant protections. First, the laws could allow tenants to dispute eviction or foreclosure when the mortgage holder's status is uncertain. Second, laws could be drafted to require increased communication between tenant and lender. Third, laws could be reformed to require the joinder of any tenants of foreclosed

---

2009) (providing that owner and plaintiff must notify tenant of foreclosure); A.B. 107, 2009 Leg. (Wis. 2009) (requiring that the plaintiff provide tenants with notice of the initial foreclosure action, foreclosure judgment, date when redemption period expires, and notice of the date and time of the confirmation hearing to confirm the foreclosure sale).

189. *See, e.g.*, CAL. CIV. PROC. CODE § 1161b(a) (West 2008) (giving tenants sixty days notice to vacate after property is sold at foreclosure); OR. REV. STAT. § 90.310 (2003) (requiring landlord to disclose any notice of default to tenant before signing lease).

190. *See generally* Nelson & Whitman, *supra* note 82, at 604-08.

property. However, none of these options buffer tenants against eviction; they simply make a tenant more aware of what is going to befall him. More must be done.

CONCLUSION

Since the 1930s, the United States has been concerned with affordable, decent housing for every American.[191] However, affordable, decent housing has eluded many Americans. Homeownership rates for Asian, African, and Hispanic Americans lag far behind those of their non-minority counterparts.[192] Additionally, African and Hispanic Americans were most likely unable to obtain financing, being more likely to be rejected when seeking home loans.[193]

Moreover, the dynamics of American society has changed in multiple ways. Americans are not paying with cash, or seeking mortgages for a multitude of reasons. As a result, the number of tenants affected by foreclosure may reach alarming numbers, which makes security of tenure an imperative need. Therefore, now is an opportune time for state legislatures to act to provide tenants with safeguards against eviction or ejection due to no fault of their own, particularly after December 31, 2012 when the federal scheme fades into the sunset.[194]

When dealing with a property owner's right to exclude others from his or her property through eviction, states must engage in a balancing act weighing those firmly rooted property rights against the developing needs of society for fair and affordable housing. The balancing act may require a jurisdiction to re-evaluate and modify the controlling law of foreclosure and eviction to ensure that those who need protection actually receive it. There are limited bases, policy or legal, for including tenants in the foreclosure process; residential tenants simply do not have a recognizable defense to foreclosure actions as their claims do not bear on whether a mortgagee can foreclose on the property.

On the other hand, however, what affects tenants most is the immediate economic loss associated with eviction and the prospect of social and cultural instability arising from displacement from their communities. Residential Landlord and Tenant Acts, in their various state law iterations, can be reformed to accommodate the social and economic costs arising from displacement, while assuring that the fundamental principles of due process, equity, and privity of contract that resonate most significantly in the public policy purposes underlying

---

191. JOSEPH B. MASON, HISTORY OF HOUSING IN THE U.S. 1930-80, at 14 (1982).

192. John Leland, *Homeownership Losses Are Greatest Among Minorities, Report Finds*, N.Y. TIMES, May 13, 2009, at A16 (pointing out that only 59.1% of Asian Americans, 47.5% of African Americans and 48.9% percent of Hispanic Americans owned homes compared to 74.9% of white Americans as of 2008).

193. *Id.* (noting that in 2007, 26.1% of applications from Hispanic Americans and 30.4% of applications from African Americans were rejected compared to only 12.1% of applications from whites).

194. Pub. L. No. 111-22, Div. A, Title VII, 123 Stat. 1660.

the landlord/tenant relationship remain intact. Although the PTFA as a federal law ultimately preempts state law, state laws, like a Residential Landlord and Tenant Act, may provide for greater protection and rights to tenants. Because the PTFA only provides tenants with baseline protections, Residential Landlord and Tenant Acts might be the best vehicle to supply tenants with ultimate safeguards upon foreclosure. Whether a tenant is rich or poor should not be a huge consideration, security of tenure is a human need. Although eviction is most devastating to the poor, disabled, or elderly, it should be the mission to provide *all* Americans with adequate housing.

This Article does not advocate a European-style Anti-Eviction System where is it nearly impossible to evict tenants; it simply seeks a framework from which tenants are protected and societal burdens are lessened. Reformation of state residential landlord and tenant acts would be in line with other current laws that curtail one's ability to evict for specified reasons, namely the Fair Housing Act of 1968.[195] Thus, no new burdens are created by these reforms. Conversely, affordable, decent housing might be an actuality instead of a dream.

195. 42 U.S.C. § 3601 (2006).

WOMEN AND SUBPRIME LENDING: AN ESSAY ADVOCATING SELF-REGULATION OF THE MORTGAGE LENDING INDUSTRY

CAROL NECOLE BROWN*

Amidst the subprime debacle, one question is difficult to ask and answer—Why would people who could qualify for prime mortgage loans end up with subprime loans? This is a particularly relevant question because market-based theories suggest that robust competition will provide better products and yet, there is persistent evidence of steering women and racial minorities, who were qualified for prime products, into subprime products.[1] My article, *Intent and Empirics: Race to the Subprime*, is just one example of the nearly countless attempts by interested financial analysts, consumer advocates, government watchdog organizations, and lawyers to figure out what happened, why the market did not function well for these borrowers.[2]

I am a property law professor. From my property law perspective, this financial industries problem ultimately affects a property matter—mortgages. My thought is that the financial industry, specifically the mortgage lending industry, should develop a system of self-regulation as part of a larger response by the financial services industry to recent events. In the end, whether mortgage lending discrimination, market failure, or a combination of these two caused the mortgage-related financial crisis, the recent events are a clarion call for financial institutions, mortgage originators, and brokers to re-evaluate their internal controls and compliance programs. The overall goal of this re-evaluation should be to implement a self-governed compliance program. Such a program could help the mortgage lending industry reinforce an ethical culture that maintains the proper alignment between corporate profit and ethical lending and corporate practices.[3]

By now, most people know that subprime lending spiked dramatically during the late 1990s through 2006.[4] Subprime mortgages as a share of the total number

---

* Professor of Law, The University of North Carolina School of Law. I would like to thank Professors Alfred Brophy and Serena Maria Williams. For my parents, the late Allen S. Brown, Jr. and the late Valerie J. Brown.

1. *See, e.g.*, Carol Necole Brown, *Intent and Empirics: Race to the Subprime*, 93 MARQ. L. REV. (forthcoming 2010), *available at* https//ssrn.com/abstract=1426142. Freddie Mac estimates that twenty percent or more of all borrowers who receive subprime loans were qualified for prime loans. Mike Hudson & E. Scott Reckard, *More Homeowners with Good Credit Getting Stuck with Higher-Rate Loans*, L.A. TIMES, Oct. 24, 2005, at A1.

2. *See* Brown, *supra* note 1, at 2-6.

3. *See* Saule T. Omarova, *Rethinking the Future of Self-Regulation in the Financial Industry*, BROOK. J. INT'L L. (forthcoming). Professor Omarova argues that self-regulation in the financial services industry, in conjunction with government regulation, can play an important role in minimizing and controlling systemic risk. *Id.*

4. Brown, *supra* note 1, at 10 n.33. "In 1994, subprime loans were fewer than 5 percent of all mortgage originations; their representation had grown to 13 percent by 1999." *Id.* (citation omitted); ALLEN J. FISHBEIN & PATRICK WOODALL, WOMEN ARE PRIME TARGETS FOR SUBPRIME

of loan originations were twenty percent in 2006, up from only nine percent in 1996.[5] The subsequent national mortgage foreclosure crisis that seemed almost uncontrollable by 2007 ignited a mortgage-related financial crisis that affected the global market place.[6] News media, business reports, government investigations, regulatory inquiries, and citizen suits focused national attention on the housing crisis and the problems attending what soon came to be known as the "mortgage meltdown."[7] A dual mortgage market had emerged in which subprime lending disproportionately affected minorities (particularly blacks and Hispanics), women, and the elderly.[8]

Evidence of the disparate impact felt by certain minority borrowers is abundant and the evidence of gender disparities in subprime lending is intriguing. I described the problem of intentional steering of black borrowers into subprime products in an earlier article.[9] I argued that the evidence of disparate impact felt by minorities, combined with compelling statistical data developed in the course of my research on this issue, made the case for a finding of not only disparate impact but of steering—intentional discrimination—based upon race.[10]

Equally compelling is the credible evidence that subprime lending and the foreclosure of these subprime mortgage loans especially affected women. The income gap between women and men has narrowed considerably in recent years and, not surprisingly, single women are making up an ever-increasing share of the ranks of new homebuyers. In 1995, single women were fourteen percent of

---

LENDING: WOMEN ARE DISPROPORTIONATELY REPRESENTED IN HIGH-COST MORTGAGE MARKET 1 (Consumer Fed'n Am. 2006). In 2004, subprime loans were twenty percent of all conventional mortgage originations. *Id.* at 2 (citing Robert B. Avery et al., *Higher-Priced Home Lending and the 2005 HMDA Data*, FED. RESERVE BULL., at A125 (Summer 2006). Using HMDA reported loans, Federal Financial Institutions Examinations Council (FFIEC) reported the rate of subprime loans at twenty-nine percent in 2006, eighteen percent in 2007, and twelve percent in 2008 evidencing the peak in 2006 and the subsequent decline. Press Release, Federal Financial Institutions Examination Council (Sept 30, 2009), *available at* http://www.ffiec.gov/hmcrpr/hm093009.htm; HAL S. SCOTT, THE GLOBAL FINANCIAL CRISIS 2-3 (2009).

5. KATALINA M. BIANCO, THE SUBPRIME LENDING CRISIS: CAUSES AND EFFECTS OF THE MORTGAGE MELTDOWN 6 (CCH 2008).

6. SCOTT, *supra* note 4, at 168-73.

7. *See* Mortgage Meltdown, http://money.cnn.com/real_estate/foreclosures (last visited May 16, 2010).

8. Brown, *supra* note 1, at 8, 34, 43 (discussing testimony of a former loan officer with CitiFinancial who admitted to targeting minorities and the elderly for expensive products); *see also* Regina Austin, *Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions*, 53 AM. U. L. REV. 1217 (2004). Austin discusses predatory lending and the problems some targeted consumers experience in getting credit. "Examples of targeted consumers include women, minorities, low-income wage earners, and senior citizens." *Id.* at 1219. For purposes of this essay and unless otherwise stated, the term Hispanic refers to non-white Hispanics.

9. *See* Brown, *supra* note 1, at 8.

10. *Id.* at 33-41.

homebuyers, which increased to twenty-one percent by 2003.[11] The numbers were relatively stable for 2008 at twenty percent and twenty-one percent for 2009.[12]

Professor Anita Hill has written that "[f]or women, the impact of problems in the lending industry crosses age, class, and racial lines as well as neighborhoods."[13] The Center for American Progress recently reported that

> unmarried women . . . are among the hardest hit by the deception, usury and other predatory lending practices that were a key part of the recent credit crisis . . . [and that] mortgage brokers and lenders disproportionately sold subprime mortgages to women on their own even when they could have qualified for lower-cost loans.[14]

The increasing participation of women in the national real estate market makes the subprime lending disparity even more central to national debate and attention. There is a growing body of evidence of gender-based disparities in lending though there have not been nearly enough studies that investigate gender disparities in lending as independent of race-based disparities.[15] For example, the National Community Reinvestment Coalition (NCRC) conducted a national field test in 2003, over a four-month period, aided by consumer protection organizations, local NCRC members, and civil rights activists. The NCRC conducted forty-eight match paired tests using white and black testers on twelve subprime lenders. The NCRC gave the testers similar profiles indicating that

---

11. Rachel Bogardus Drew, *Buying for Themselves: An Analysis of Unmarried Female Home Buyers* 4 (Joint Ctr. Hous. Studies, Harv. Univ. 2006), *available at* www.jchs.harvard.edu/publications/markets/n06-3_drew.pdf.

12. Jessica Lautz, *Single-Women Home Buyers: A Growing Segment*, REAL ESTATE INSIGHTS, Apr. 2010, at 11, *available at* http://www.realtor.org/wps/wcm/connect/3177a800421b53e3ba64fed140d385a7/REI0410.pdf?MOD=AJPERES&CACHEID=3177a800421b53e3ba64fed140d385a7 ("Indeed, the percentage of single-women buyers has increased from 14 percent in 1995 to 21 percent in 2009.").

13. Anita F. Hill, *Women and the Subprime Crunch*, BOSTON GLOBE, Oct. 22, 2007, at A11.

14. Liz Weiss, *Protecting Unmarried Women from Unscrupulous Lenders*, CTR. FOR AM. PROGRESS, Oct. 28, 2009, at 1, *available at* http://www.americanprogress.org/issues/2009/10/unmarried_women_financial.html.

15. *See, e.g.*, Judith K. Robinson, *Race, Gender, and Familial Status: Discrimination in One US Mortgage Lending Market*, FEMINIST ECON., July 2002, at 63, 65-66 (relying on 1992 Boston Federal Reserve mortgage lending study and discussing gender and familial-status lending patterns that differ by race). A study relying on 2003 federal data of 331 Metropolitan Statistical Areas showed that in each one, women were more likely to receive a subprime loan than a prime loan. Sue Kirchhoff, *Minorities Depend on Subprime Loans*, USA TODAY, *available at* http://www.usatoday.com/money/perfi/housing/2005-03-16-subprime-usat_x.htm. *But see* NAT'L COUNCIL OF NEGRO WOMEN, ASSESSING THE DOUBLE BURDEN: EXAMINING RACIAL AND GENDER DISPARITIES IN MORTGAGE LENDING 10 (2009), *available at* www.ncnw.org/images/double_burden.pdf (stating that its analysis of 2007 Home Mortgage Disclosure Act data did not reveal "gender-based disparities in lending").

each of the testers was qualified for a prime loan. The black testers were given slightly better profiles than the white testers. The purpose of the testing was to review the underwriting practices of the subject lenders to determine if there was evidence of price discrimination. The NCRC noted several occasions in which black female testers received less favorable treatment than white female testers.[16] The report notes one instance in which a black female tester was told that the lender would rely upon her husband's income and credit because it was slightly higher than the tester's.[17] The lender did not tell the white female tester about this policy nor did the lender ask the white tester about income.[18] In a separate instance, the lender not only provided the black female tester with less information than was provided to the white female tester, but also, when following up with the black female tester, the lender called the tester's husband instead of the tester.[19]

The NCRC published a study in 2006 using home loan data for 2004. According to the study, "female borrowers of all racial groups have difficulties securing affordable home loans and receive a surprisingly high number of high cost loans."[20] The NCRC reported that the amount of subprime loans received by

---

16. Press Release, Sub-Prime Fair Lending "Mystery Shopping" Update (July 21, 2008) (on file with author).

17. *Id.* Such behavior violates the Equal Credit Opportunity Act's prohibition on discrimination based upon sex in credit transactions. *See* Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1),(b)(1) (2006).

> Sec. 1691. Scope of prohibition
>
> (a) Activities constituting discrimination
> It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—
>
> (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract) . . .
>
> (b) Activities not constituting discrimination
> It shall not constitute discrimination for purposes of this title for a creditor—
>
> (1) to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness . . .

Id.; *see* Helen Ladd, *Evidence on Discrimination in Mortgage Lending*, J. ECON. PERSP., Spring 1998, at 41, 45 (discussing documented survey evidence of discrimination against women in the lending process such as the discounting of the wife's income by fifty percent or more and also discounting the wife's income if there were pre-school children or she was of childbearing age).

18. Press Release, *supra* note 16, at 7.

19. *Id.*

20. NAT'L CMTY. REINVESTMENT COAL., HOMEOWNERSHIP AND WEALTH BUILDING

women was greater than their share of the national household while the share of subprime loans received by men was less than their share of the national household.[21] In contrast, the share of prime loans received by men was higher than their representation in the national household.[22] The study also noted that middle-income women, in particular, are underrepresented in the share of prime loans received.[23]

A 2006 Consumer Federation of American study found that gender matters when it comes to getting a prime loan. This gender disparity crosses product lines and surfaces in refinance, home improvement, and in home purchase lending.[24] According to the study, which used 2005 Home Mortgage Disclosure Act (HMDA) data for in excess of three hundred fifty metropolitan areas nationwide and more than four million loans, women at all income levels were disparately impacted.[25] This study also confirmed that disparate subprime lending practices especially affected black and Hispanic women.[26] As women's incomes spiked above two times the area median income, upper income black women were almost five times more likely to receive a mortgage in the subprime market than were upper income white men.[27] Accounting for all income levels, black women were 256.1 percent more likely than white men to receive subprime purchase mortgages.[28] Although the evidence is not as compelling, it is worth noting that black women were also more likely to receive subprime mortgages than black men by a rate of 5.7 percent.[29] In sum, women, particularly black and Hispanic, were more likely to be saddled with a subprime mortgage than were men with similar incomes.

What evidence there is suggests that lenders may have been engaging in a practice of gender-based steering of women, especially women of certain minority groups, into subprime loans, when they were qualified for prime loans and when their male peers with comparable financial pictures received prime

---

IMPEDED: CONTINUING LENDING DISPARITIES FOR MINORITIES AND EMERGING OBSTACLES FOR MIDDLE-INCOME AND FEMALE BORROWERS OF ALL RACES 1 (2006).

21. *Id.* at 2-3.

22. *Id.*

23. *Id.* at 3-4.

24. FISHBEIN & WOODALL, *supra* note 4, at 1.

25. *Id.* at 4.

26. *Id.*

27. *Id.* at 3-4.

> For purchase mortgages, women earning double the median income are 46.4 percent more likely to receive subprime mortgages than men with similar incomes. In contrast, women earning below the area median income are 3.3 percent more likely to receive subprime mortgages. Women earning between the median and twice the median income are 28.1 percent more likely to receive subprime purchase mortgages than men.

Id. at 3.

28. *Id.* at 4.

29. *Id.*

loans.[30] Certainly being both a woman and a minority hurts black and Hispanic women's chances of getting a prime rate mortgage loan.

The banking industry has responded in a rather predictable way to these recent events. The more common responses include statements include:

- You are over generalizing—attributing the actions of a few brokers or lenders to the entire industry.[31]
- This HMDA data you rely upon is limited, it is not telling the entire story because lenders consider many factors in addition to those HMDA requires lenders to report and there are also many loans that HMDA doesn't require lenders to report.[32]
- This is a very subjective process and has to be if lenders are going to be able to make loans to minorities and lower income people.[33]
- The Community Reinvestment Act is really to blame.[34]

Consumer advocates and members of Congress have responded to these

---

30. *E.g.*, Minority Subprime Borrowers, Minorities Pay More for Home Ownership (Oct. 2002), http://www.consumersunion.org/pdf/au-minority-rpt.pdf (last visited May 16, 2010). Consumers Union released a study analyzing the impact of gender as a predictor of whether or not a borrower would receive a subprime loan or refinance. The impact of borrowers' race as a predictor was constant across gender lines and Consumers Union found that among all categories of race and gender, "subprime companies enjoy their highest penetration rates among Black women borrowers and in high . . . minority neighborhoods." *Id.* at 3; *see* FISHBEIN & WOODALL, *supra* note 4, at 1; NAT'L CMTY. REINVESTMENT COAL., *supra* note 20. *But see* NAT'L COUNCIL OF NEGRO WOMEN, *supra* note 15, at 10 (stating that its analysis of 2007 Home Mortgage Disclosure Act data did not reveal "gender-based disparities in lending").

31. *See* Claire A. Hill, *Who Were the Villains in the Subprime Crisis, and Why It Matters*, 4 ENTREPRENEURIAL BUS. L.J. 323 (2010), *available at* http://moritzlaw.osu.edu/eblj/issues/volume4/number2/Hill.pdf (discussing the actors in the subprime mortgage crisis and ranking them in terms of their degree of villainy); *see also* Brown, *supra* note 1, at 25 (discussing a Boston Fed study that "tested the pervasiveness of possible race bias [in the context of the subprime mortgage crisis] by questioning whether racial disparities in rejection rates were due to isolated discriminatory conduct by one or two institutions in contrast to market-wide phenomenon of discrimination").

32. *See generally* Darryl E. Getter, *Reporting Issues Under the Home Mortgage Disclosure Act*, CRS REPORT FOR CONGRESS 3-4 (Oct. 24, 2008) (discussing HMDA reporting requirements and coverage).

33. See Brown, *supra* note 1, at 17-21 for a discussion of the subjective and objective information lenders receive as part of the lending process.

34. For example, consider the following issue brief from the Center for Responsible Lending (CRL) in which the CRL states that:

> In an attempt to divert attention away from the destructive lending practices that fueled the credit crisis, some are trying to place the blame for it on the Community Reinvestment Act (CRA). They argue that CRA forced lenders to make risky loans to low and moderate families and to communities of color.

Center for Responsible Lending, *CRA Is Not to Blame for Mortgage Meltdown*, http://www.responsiblelending.org/mortgage-lending/policy-legislation/congress/cra-not-to-blame-for-crisis.pdf (last visited Oct. 3, 2008).

alleged discriminatory practices with calls for: (1) strengthening the HMDA reporting requirements for covered institutions to include all of the variables that financial institutions consider when determining creditworthiness and when pricing loans, (2) greater accountability through the establishment of a set of national mortgage lending standards (a move away from deregulation of mortgage markets), (3) consolidating our fragmented banking regulatory structure, (4) fixing the mortgage securitization process to promote greater disclosures (a quality of investment problem) and to ensure closer alignment of the incentives of investors and originators, (5) imposing stricter enforcement of existing consumer protection laws, and (6) backing away from federal preemption of state consumer protection laws.[35]

The mortgage-related financial crisis emphasized the deficiencies in the internal controls and compliance programs of the participants in the nation's mortgage lending industry. Existing compliance programs failed the test during this most recent financial crisis. The mortgage lending industry should re-evaluate its internal controls and compliance programs toward the goals of reinforcing an ethical culture and maintaining proper alignment between corporate profit and ethical lending and corporate practices. This Essay offers three recommendations for considering how to address the systemic failure of internal controls that contributed to the financial crisis.

First, the mortgage lending industry should coalesce to produce a common set of internal controls that are designed to prevent two major problems: (1) steering borrowers who qualify for prime loans into subprime loans and (2) placing borrowers who do not qualify for either a prime or subprime loan into a subprime loan. The former practice increases the cost of credit and therefore the likelihood of default for these borrowers who might not otherwise have defaulted. The latter practice, which is based on so-called "stated-income mortgages," reflects the erosion of a financial institution's underwriting standards. Under this practice, lenders accept the borrower's statement of income and fund the loan, provided the borrower's FICO score and whatever appraisals the lender ordered are verified. These loans developed the name "liar loans" because borrowers could claim whatever income they liked and the loan would fund, again, as long as the FICO and appraisals checked out.[36] To get the quantity of mortgages desired, many financial institutions sacrificed quality and relaxed their underwriting and compliance standards; they engaged in behavior that was, at the very least, unethical, and the national economy suffered.[37]

---

35. Press Release, New York Officials, NAACP Call on the OCC to Reverse Its Position on Federal Preemption of State Predatory Lending Laws (Dec. 10, 2003), *available at* http://www.oag.state.ny.us/media_center/2003/dec/dec10a_03.html (stating "the OCC issued an advisory letter to national banks advising them that they are not subject to state enforcement"); SCOTT, *supra* note 4, at 165.

36. PAUL MUOLO & MATHEW PADILLA, CHAIN OF BLAME: HOW WALL STREET CAUSED THE MORTGAGE AND CREDIT CRISIS 7, 86-87 (2008).

37. *Id.* at 124-25, 197 (discussing the FBI's characterization in 2006 of the loan fraud pandemic in the country and "singling out stated-income loans . . . being funded through mortgage

Second, boards of directors and senior management of mortgage lending institutions should commit to developing a more ethical culture; ethics always trumps compliance. Monitoring compliance programs and mortgage lending decisions on an ongoing, real time basis could be an important step towards developing and maintaining a more ethical corporate compliance structure.[38] Strengthening mortgage lenders' compliance posture and providing effective governance over mortgage lending decisions would require the establishment of an integrated compliance system of internal reporting and external auditing. Each mortgage lending institution would articulate its non-discriminatory mortgage lending standards as a foundational element of its compliance program. The mortgage lending standards would be self-articulated and individualized. Using an institution's self-articulated standards would allow institutions to incorporate legitimate, subjective criteria into their compliance programs. But such subjective criteria would be subject to routine, independent monitoring and auditing. This approach would allow institutions to structure their compliance programs to implement the policies and internal controls that will be most effective in building an ethical culture and in ensuring the institution's compliance with applicable mortgage lending laws and regulations.

Lastly, mortgage-lending institutions should develop a system of external audits of their mortgage lending practices and engage in voluntary self-disclosure programs. A system of periodic external auditing would bring an additional level of objectivity and independence to the compliance assessment process. External auditors, in particular, can bring an additional value; they work for numerous clients and have experience with a wider variety of industry regulatory and compliance practices. The value external auditors bring is their credibility with regulators and their independence from the institution. Because of this independence and because of their exposure to a variety of institution types and systems, external auditors may uncover issues that are new to an institution and may offer proven solutions that are likewise novel to the internal monitor. If the institutions perform the internal monitoring objectively and competently, as determined by the external auditors, the regulators can rely on the internal monitoring, to varying degrees, which creates greater efficiencies and saves money. Effective compliance builds trust in the system and among key stakeholders.

Self-governed compliance programs are not novel. In the wake of procurement scandals that plagued the U.S. defense and aerospace industry in the 1980s, the defense industry decided to coalesce and to work together to share and develop best practices for improving its ethics and compliance posture across the industry. In June 1986, the thirty-two major defense contractors established the Defense Industry Initiative on Business Ethics and Conduct (DII). DII members, known as Signatories, commit to the DII Principles as set forth in the

---

brokers as the chief problem").

38. *See* David Hechler, *Risky Business: Did Compliance Programs Fail the Test During the Financial Industry Meltdown?*, CORP. COUNSEL, Apr. 1, 2009, *available at* http://www.law.com/jsp/cc/pubarticlecc.jsp?id=1202429141994.

organization's charter. The principles are the following:

(1) Each Signatory shall have and adhere to a written code of business conduct. The code establishes the high ethical values expected for all within the Signatory's organization.
(2) Each Signatory shall train all within the organization as to their personal responsibilities under the code.
(3) Signatories shall encourage internal reporting of violation of the code, with the promise of no retaliation for such reporting.
(4) Signatories have the obligation to self-govern by implementing controls to monitor compliance with federal procurement laws and by adopting procedures for voluntary disclosure of violations of federal procurement laws to appropriate authorities.
(5) *Each Signatory shall have responsibility to each other to share their best practices in implementing the DII principles*; each Signatory shall participate in an annual Best Practices Forum.
(6) Each Signatory shall be accountable to the public.[39]

In essence, the DII's objectives are the promotion of self-governance and internal reporting, the sharing of best practices related to business and ethics, and the promotion and nurture of ethical conduct in the defense industry.

Signatories are often competitor companies and sometimes they are partners. They work together in a spirit of coopetition. Companies wishing to join DII must subscribe to the six principles mentioned above. Fundamental to membership in the DII is the commitment to share business conduct and ethics best practices; sharing of best practices is strictly limited to ethics and business conduct and does not include the sharing of competitive business information or practices.[40] The DII holds an annual Best Practices Forum, which is one of the means by which Signatories share best practices. The Signatories regard the sharing of best practices as one of the most important benefits of membership in the DII.

The DII wrote in its 2000 Annual Report that "[t]he overarching principle of corporate self-governance, the bedrock of what DII is all about is embedded in the U.S. Sentencing Commission's sentence guidelines for corporations."[41] The Federal Sentencing Guidelines apply to organizations, including financial

---

39. Charter of the Defense Industry Initiative on Business Ethics & Conduct, Art. III (2004), *available at* www.dii.org/resources/dii-charter.pdf (emphasis added).

40. PUBLIC ACCOUNTABILITY REPORT OF THE DEFENSE INDUSTRY INITIATIVE ON BUSINESS ETHICS & CONDUCT 2 (2008-2009), *available at* http://www.dii.org/resources/annual-report-20089.pdf.

41. *Origins and Development of the Defense Industry Initiative*, *in* 2000 DEF. INDUS. INITIATIVE ANN. REP. 10 ("discussing development of Defense Industry Initiative in the pre-Guidelines era"), *as cited and quoted in* Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 707 n.44 (2002).

institutions and brokers.[42] The Sentencing Guidelines impose penalties on organizations that violate federal criminal law. Importantly, the Sentencing Guidelines are also intended to incentivize organizations to develop and maintain compliance programs that are effective and that deter illegal and unethical conduct.[43]

If mortgage lenders intentionally target women for subprime mortgages, these institutions are susceptible to claims that they are violating federal housing, fair lending, and anti-discrimination laws and could be subject to civil sanctions. Although the Sentencing Guidelines would not apply in this type of corporate context to an institution's activities, where there are no federal criminal violations, they provide a useful framework for financial institutions to use to move forward and better police their own internal activities and create an ethical business culture.

The Sentencing Guidelines establish seven minimum criteria for an effective ethics and compliance program. [1] The organization must establish compliance procedures and standards designed to detect and to prevent criminal conduct. [2] Specific, high level personnel must be delegated responsibility for compliance oversight. [3] Reasonable due diligence must be exercised to make certain that individuals with substantial compliance authority are not ethically compromised. [4] The organization must communicate compliance procedures and standards to its employees. [5] The organization must establish monitoring, auditing, and reporting systems with appropriate safeguards to ensure employees follow its compliance program. [6] Compliance should be part of the performance evaluation and consequences should exist if there are violations of laws, regulations, or ethical policies. [7] If violations are detected, the organization shall have standards in place to achieve an appropriate and timely response. An appropriate response may include modifications to the compliance program and standards.[44]

Thus, the Sentencing Guidelines and the minimum criteria might be useful, as a guide and in conjunction with other self-regulatory mechanisms, in developing and articulating a self-regulatory regime, one that would allow the mortgage lending industry to effectively monitor its members for unethical conduct and for activities that contributed to the financial market instability the nation is currently experiencing.

In conclusion, self-regulation of its practices by the mortgage lending industry should be considered as part of the "dramatic action"[45] that has been necessitated by the financial crisis in this country and around the globe. In many sectors, self-regulation and codes of conduct are increasingly popular and

---

42. *See* U.S. SENTENCING COMMISSION, GUIDELINES MANUAL § 8B2.1 (2009).

43. Murphy, *supra* note 38, at 703.

44. U.S. SENTENCING COMMISSION, *supra* note 39, § 8B2.1.

45. Timothy F. Geithner, President & Chief Executive Officer of the Fed. Reserve Bank of N.Y., Remarks at the Economic Club of New York, *Reducing Systemic Risk in a Dynamic Financial System*, *available at* http://www.newyorkfed.org/newsevents/speeches/2008/tfg080609.html (discussing the role of financial innovation in contributing to the global financial crisis).

implemented as part of a process of establishing high standards and meeting them. This Essay is part of a dialogue about the role of self-regulation in improving mortgage-lending practices, nationally, and affording greater protections to groups made vulnerable to steering and other forms of mortgage lending discrimination. I hope this Essay becomes part of a broader discussion about how to develop, implement, monitor, and effectively assess self-regulatory programs in the mortgage lending industry.

THE REALLY NEW PROPERTY: A SKEPTICAL APPRAISAL

STEVEN J. EAGLE*

I. THE CALL FOR TRANSFORMATIVE ACTIVITY

The simple idea that it needs only a change in some external thing (such as the structure of property rights) to transform the human condition is superstition lurking behind many treatments of the subject.[1]

A. The Beguiling Nature of Transformation

The call for transformation in property law reminds us that there is nothing new under the sun.[2] Moderns have sought secular salvation; first through Marxism,[3] and more recently through progressive or free market economics.[4] Many have sought it through reform of law in general, and property law in particular. This is hardly surprising, because the "idea that law is a governing instrument is central to American jurisprudential thought," and scholars with disparate objectives have described "law" in terms they found congenial.[5]

Like the prophets of biblical days, "modern American lawyer-prophets . . . [have] brought prophetic anger at injustice into the public square in America."[6] Hearkening to the New Deal and Civil Rights revolutions, when "law became a

---

* Professor of Law, George Mason University School of Law, Arlington, Virginia (seagle@gmu.edu).

1. Kenneth R. Minogue, *The Concept of Property and Its Contemporary Significance*, *in* NOMOS XXII: PROPERTY 3, 8 (J. Roland Pennock & John W. Chapman eds., 1980).

2. *Ecclesiastes* 1:9. *See infra* note 7. An earlier version of this Article was presented at an Association of American Law Schools (AALS) panel on "Law as Transformative Agent: Thinking and Doing Property in New Categories."

3. *See* KARL MARX, CAPITAL (Eden & Cedar Paul trans., J.M. Dent & Sons Ltd. 1978) (1867) (The first volume of Karl Marx's *Das Kapital* was published in 1867. Marx asserted not only that capitalism exploited and alienated labor, but also that it separated subjective moral value and objective economic value.).

4. *See generally* Steven J. Eagle, *Economic Salvation in a Restive Age: The Demand for Secular Salvation Has Not Abated*, 56 CASE W. RES. L. REV. 569 (2006). The relationship between market activity and human flourishing remains the subject of lively debate. *See, e.g.*, Brian Leiter, *Marxism and the Continuing Irrelevance of Normative Theory*, 54 STAN. L. REV. 1129, 1136 (2002) ("When conservatives argue that the welfare state is doomed because it stifles private enterprise . . . they are adopting Marx's argument that economics is the driving force in human development.") (quoting John Cassidy, *The Return of Karl Marx*, NEW YORKER, Oct. 20, 1997, at 249, 250).

5. Rakesh K. Anand, *Legal Ethics, Jurisprudence, and the Cultural Study of the Lawyer*, 81 TEMP. L. REV. 737, 739 n.6 (2008) (citing, inter alia, the following examples: legal process, law and economics, and critical legal studies).

6. Thomas L. Shaffer, *Lawyers and the Biblical Prophets*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 521, 521 (2003).

powerful tool to challenge and reconfigure social institutions,"[7] Association of American Law Schools President Rachel Moran asked: "Is the citizen-lawyer now largely relegated to some lost golden age of reform?"[8]

Our law of property is imperfect, as are our other social and economic institutions. It is thus entirely fitting that we commit ourselves to the search for correctives.[9] The label "citizen-lawyer" implies the application of legal skill to a range of public policy issues that go well beyond the administration of the judicial system. Perceived imperfections in property law historically have been a rich target for reform. "[M]odern Utopians . . . have tended to find private property distasteful and an impediment to perfectionist aspirations."[10] However, the reformist tendency conflicts with other values, because "if politics is only about property, it seems materialistic . . . . Yet a politics of virtue and justice can easily devour property."[11]

In considering social reform, the role of law is in uneasy tension with the role of social science. As Dean Anthony Kronman has noted,

> the past is, for lawyers and judges, a repository not just of information but of value, with the power to confer legitimacy on actions in the present, and though its power to do so is not limitless, neither is it nonexistent. In philosophy, by contrast, the past has no legitimating power of this sort.[12]

Nor does the past have legitimizing value in engineering or in economics, although, to be sure, practitioners try to learn from past events and from successes and failures in past endeavors.

Abrupt swerves in the law deprive it of legitimacy, especially where courts

---

7. Rachel Moran, *Transformative Property*, https://memberaccess.aals.org/eWeb/DynamicPage.aspx?webcode=EventInfo&Reg_evt_key=e95fe6b3-00bd-4570-950c-d1bfa09e510c&RegPath=EventRegFees (last visited May 17, 2010). The theme of the AALS 2010 annual meeting was "transformative law." This thesis carried over to the joint program of the AALS Property and Real Estate Transactions Sections, titled "Law as Transformative Agent: Thinking and Doing Property in New Categories," where an earlier version of this Article was presented. *See* AALS Annual Meeting Program 22 (Jan. 6-10, 2010), *available at* http://www.aals.org/am2010/AMProgram2010.pdf.

8. Moran, *supra* note 7.

9. *See, e.g.*, Frank I. Michelman, *Ethics, Economics, and the Law of Property*, *in* NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW 3, 33-34 (J. Roland Pennock & John W. Chapman eds., 1982), *reprinted in* 39 TULSA L. REV. 663, 689 (2004)) (noting that, in such instances as individuals selling rights over their bodies in exchange for subsistence, "[t]hough it might turn out that there is no way . . . to make things on the whole any better, you would be committed to at least searching for some corrective").

10. Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1898 (2007).

11. Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 889-90 (2009).

12. Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1032-33 (1990).

opine on polarizing issues in which they have no discernable special expertise or authority. As Ninth Circuit Court of Appeals Judge Alex Kozinski put it, "When we act like politicians we can expect to be treated like politicians."[13] Also, there is a fine line between the life of the law being governed by experience,[14] and by expedience.[15] Abrupt change also inflicts harm on those who relied on previously settled law and may confer windfall gains on others.[16] Although some would go so far as to celebrate "property outlaws" who force transformation in law by extralegal means,[17] the lack of stable property institutions has been a substantial bar to development.[18]

The debate over the modification of property law norms for advancing political goals has its genesis in the nature of law itself. For much of our history, the prevailing mode of thought was legal formalism, with its stress on law as autonomous, comprehensive, and structured.[19] "In the formalist conception, law has a content that is not imported from without but elaborated from within. Law is not so much an instrument in the service of foreign ideals as an end in itself constituting, as it were, its own ideal."[20] On the other side of the debate is instrumentalism, the notion that law should advance wealth maximization,[21]

---

13. United States v. Burdeau, 180 F.3d 1091, 1094 (9th Cir. 1999) (Kozinski, J., dissenting). While it is well within the common law tradition for courts to speak to other courts about the development of legal rules, it is novel and inappropriate to use the bench as a pulpit from which to deliver sermons to Congress about which laws it should pass, or to instruct the Justice Department on how to prosecute its criminal cases. These are matters entrusted by the Framers to the political branches, and we may not squander the court's moral capital by attempting to influence political processes.

Id. I am indebted to Gideon Kanner for calling Judge Kozinski's opinion to my attention.

14. OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed., The Belkamp Press of Harvard Univ. Press 1963) (1881) ("The life of the law has not been logic: it has been experience.").

15. *See* Kisbey v. State, 682 P.2d 1093, 1095 (Cal. 1984) ("[T]he life of the law is not logic, but expedience."); *see also* Gideon Kanner, *When Rip Van Winkle Meets 21st Century Jurisprudence*, L.A. DAILY J., June 2, 2009, at 6.

16. *See, e.g.*, Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 511 (1986) (analyzing how transitions in law "impose gains and losses on those who, prior to the change, had taken actions with long-term consequences").

17. *See* EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP (2010).

18. *See, e.g.*, HERNANDO DE SOTO, *Preface to* THE LAW AND ECONOMICS OF DEVELOPMENT, at xiii, xiii (Edgardo Buscaglia et al. eds., 1997) ("Those nations that have succeeded in developing a market-oriented economy are not coincidentally those that have recognized the need for and secured widespread property rights protected by just laws.").

19. *See, e.g.*, Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335, 335 (1988).

20. Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 956 (1988).

21. *See, e.g.*, Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL

social solidarity,[22] or some other external goal.

In *The Path of the Law*,[23] Oliver Wendell Holmes, Jr., averred that judges "have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious."[24] Professor Hanoch Dagan quotes this language as Holmes' claim that the "formalist fallacy" serves as a "cover-up."[25]

Holmes continued, "if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition."[26] After a brief trek through the Year Books, German forests, and assumptions of dominant classes,[27] he concluded:

> [History] is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules. . . . For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[28]

Dean Anthony Kronman retorted:

> Holmes' celebrated dictum that "the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics," should thus be understood as a call for the rejection of tradition and, to the extent it rests upon traditionalist assumptions, of precedent itself, an unshackling of the law from the authority of the past and its replacement by the timeless authority of reason, or more precisely, by the particular species of reason that is embodied in the calculative judgments of economic science.[29]

"From the viewpoint of an economist, the past has no inherent authority,"[30] Kronman added, "and an appeal to it can never have, for him, a justificatory

---

STUD. 103 (1979).

22. *See, e.g.*, ROBERTO MANGABEIRA UNGER, PASSION: AN ESSAY ON PERSONALITY 21-22 (1984).

23. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

24. *Id.* at 467.

25. Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 617 (2007).

26. Holmes, *supra* note 23, at 469.

27. *Id.* at 468-69.

28. *Id.* at 469.

29. Kronman, *supra* note 12, at 1036 (quoting Holmes, *supra* note 23, at 469).

30. *Id.*

power of its own."[31]

The logical end of instrumentalism is the assertion that "[t]he idea of authority is a fabrication," that "[c]laims of moral right to be obeyed owe their historic salience to the self-interest of claimants," and that "human communications become law simply by participating in a self-recognizing system that successfully signals what people are likely to do and to expect."[32] Similarly, it has been argued that the difference between law and politics is only "a dualistic ontological conception."[33]

Early in their careers, my own law school mentors, Myres McDougal and Harold Lasswell, focused on legal education and public service. They noted that training for the public profession of the law has been the purview of law teachers, a "subsidized intellectual elite."[34] Despite lamentations about the need to refashion the curriculum to serve "insistent contemporary needs,"[35] little has been done to incorporate social science into law and to make jurisprudence responsive to "the major problems of a society struggling to achieve democratic values."[36]

Lawyers, when advising policy makers regarding legal constraints, they added, are "in an unassailably strategic position to influence, if not create, policy."[37] McDougal summed up legal realism as standing for the proposition that "law is *instrumental* only, a means to an end, and is to be appraised only in the light of the ends it achieves."[38]

Karl Llewellyn, a leading proponent of American Legal Realism, reported in 1931 that "[f]irst efforts have been made to capitalize the wealth of our

---

31. *Id.*

32. Laurence Claus, *The Empty Idea of Authority*, 2009 U. ILL. L. REV. 1301, 1301.

33. Miro Cerar, *The Relationship Between Law and Politics*, 15 ANN. SURV. INT'L & COMP. L. 19, 20 (2009). Dr. Cerar's article further notes:

> Law and politics as social phenomena are two emanations of the same entity (a monistic ontological conception), regarding which their separate existence is only a consequence of a human dualistic or pluralistic perception of the world (a dualistic ontological conception). Furthermore, the difference between law and politics is, from a deeper ontological perspective, in fact only illusory, for reason of which also in the fields of legal and political theory and philosophy there are conclusions regarding the partial or complete overlapping of law and politics, sometimes even the equating of the two that raises a crucial question of how both notions are defined. Regardless of such findings, the distinction (i.e. consciously persisting in a distinction) between law and politics at the current level of human development is necessary and indispensable.

Id.

34. Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 203 (1943). McDougal was president of the AALS in 1966.

35. *Id.*

36. *Id.* at 205.

37. *Id.* at 209.

38. Myres S. McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 YALE L.J. 827, 834-35 (1941).

reported cases to make large-scale quantitative studies of facts and outcome."[39] Three-quarters of a century later, Thomas Miles and Cass Sunstein reported that we "are in the midst of a flowering"[40] of studies attempting "to understand the sources of judicial decisions on the basis of testable hypotheses and large data sets."[41] In such analysis, it is asserted, researchers are abjured from wasting time on determining whether politics has some effect on judicial decisionmaking, because the only pertinent question is not if, but rather how much.[42]

However, Sunstein himself has noted systemic problems in human cognition,[43] and the urge to quantification and construction of models might be merely another symptom of what Professor Daniel Farber referred to as "economics' famous case of 'physics envy.'"[44]

B. A Clash of Visions

For some, engaging in transformative activity for social justice is what Justice Holmes called a "can't help."[45] Nevertheless, there are fundamental problems with the urge to transform property. Change, even transformative change, does not necessarily represent progress. Some transformations are reactionary. Almost 150 years ago, Sir Henry Maine observed that "we may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*."[46] The bedraggled villain of medieval times cast down

---

39. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1243-44 (1931).

40. Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 831 (2008).

41. *Id.*

42. Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685 (2009).

43. *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008). *See infra* notes 110-12 and accompanying text.

44. Daniel A. Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279, 295 (2001).

> Some of us do find the theoretical elegance of physics more congenial than the complexities of molecular biology, and it would be nice if the social sciences turned out to be as elegant as relativity or quantum mechanics. But there is no reason to believe that a successful science of human behavior will look more like physics than like biology.

Id.

45. Letter from Oliver Wendell Holmes, Jr., to Lewis Einstein (June 17, 1908), *in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 69, 70 (Richard A. Posner ed., 1992) ("[A]s I have said before all I mean by truth is what I can't help thinking. But my can't helps are outside the scope of exhortation. . . .").

46. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 165 (Beacon Press 10th ed. 1963) (1861) (emphasis omitted).

his eyes and tugged at his forelock as his lord rode by. Replacing status subordination with formal legal equality surely is a salutary development, notwithstanding the "revolution"[47] that removed residential landlord-tenant law from the realm of private contract and private ordering[48] and reconverted that relationship from contract to status.[49]

Equality before the law does not, of course, equate to equality in other aspects of life.[50] However, the fact that legal equality does not solve many of life's problems does not necessarily mean that a change to a different legal regime would be for the better.

The economist Harold Demsetz suggested some useful postulates here. The first is the "nirvana" fallacy, which refers to the proclivity to view markets in the context of their warts, such as externalities and other market failures, while juxtaposing markets with an idealized view of government regulations, that simply are assumed to be optimal.[51] Demsetz added that "[t]he nirvana approach is much more susceptible than is the comparative institution approach to committing three logical fallacies—*the grass is always greener fallacy*, *the fallacy of the free lunch*, and *the people could be different fallacy*."[52] Under an idealized system, things probably would be better. But it is not implausible that, in many instances, nowhere is the grass green enough. As Carol Rose put it, "in this vale of tears, second-best may be the best that we can do."[53]

---

47. Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984).

48. *See* Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 575-76 (1982).

49. *See* Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3 (1979).

50. ANATOLE FRANCE, THE RED LILY 95 (Frederic Chapman ed., Winifred Stephens trans., John Lane Co. 1910) (1894). Witness Anatole France's sardonic comment upon "the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread." *Id.* at 95.

51. *See* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969). The fallacy first was described in R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 43 (1960) (noting comparisons between "a state of laissez faire and some kind of ideal world").

52. Demsetz, *supra* note 51, at 2 (noting that the propensity of private enterprise to underinvest in basic research does not mean that government will achieve a better allocation).

53. Rose, *supra* note 10, at 1926.

> Economic thinkers have come to realize that [the person who is self-seeking but generous to those who reciprocate] is a great source of wealth-production—much more so than the purely saintly type. Economic success often serves as the rationale for ignoring the unsolvable issues of entitlement and distribution that dog property regimes. But moral thinkers might well consider that this kind of person, the normal subject of property, is also worthy of some respect. This is not because she is perfect, which she is not, and not simply because her characteristics are so productive, which they are, but because she has her own streak of divinity. It is a streak that, although wary, is still

In a memorable political address, Governor Mario Cuomo declared "we must be the family of America."[54] But the correlative of treating millions of people we do not know as if they were our family is that we must treat our intimates no better than we do strangers. There are people who can do this. Mother Theresa comes to mind, but she was a saint. Most people are not. It is human nature, using Adam Smith's illustration, to regard the severance of one's little finger as more important that the ruin of millions.[55]

Our system of property law is based primarily on common law accretion of precedent in narrow cases over a millennium, not on top-down mandates.[56] At its core, transforming our legal system is predicated on transforming our nature. As Thomas Sowell described in *A Conflict of Visions*,[57] it is easy to intuit from a person's views on several selected issues his or her views on many more that seem unrelated. The key is that some individuals have what Sowell termed an unconstrained vision of the perfectibility of human kind, whereas others have a constrained vision of the same. The latter group deems human nature inherently flawed and that the task of organized society is to create a setting conducive to most people getting along reasonably well most of the time. Similar views that conservatism is a temperament, not an ideology, are associated with Michael Oakeshott.[58] This proposition is grounded in a humility that reflects Immanuel

---

> trustful, trustworthy, and good-willed—all traits that can be enhanced by institutions that recognize that, in this vale of tears, second-best may be the best that we can do.

Id.

54. Mario Matthew Cuomo, 1984 Democratic National Convention Keynote Address, (July, 16 1984), *available at* http://www.americanrhetoric.com/speeches/mariocuomo1984dnc.htm (declaring that "the failure anywhere to provide what reasonably we might, to avoid pain, is our failure").

55. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 157 (Knud Haakonssen ed., Cambridge University Press 2002) (1761) ("If [a man would] lose his little finger to-morrow, he would not sleep to-night; but, provided he never saw them, he will snore with the most profound security over the ruin of a hundred millions of his brethren.").

56. *See* Hage v. United States, 35 Fed. Cl. 147 (1996).

> The Anglo-American case precedent is literally made up of tens of thousands of cases defining property rights over the better part of a millennium. The legal task is very unlike legislative policy-making because judicial decision-making builds historically and logically upon past precedent in narrow cases and controversies rather than current general exigencies or sweeping political mandates.

Id. at 151.

57. THOMAS SOWELL, A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES (Basic Books 2007) (1987).

58. *See* MICHAEL OAKESHOTT, *On Being Conservative*, *in* RATIONALISM IN POLITICS AND OTHER ESSAYS 168, 169-88 (1962).

> To be conservative . . . is to prefer the familiar to the unknown, to prefer the tried to the untried . . . the limited to the unbounded . . . [W]hat makes a conservative disposition in politics intelligible is nothing to do with natural law or a providential order, nothing to do with morals or religion; it is the observation of our current manner of living

Kant's admonition:

> [W]hile man may try as he will, it is hard to see how he can obtain for public justice a supreme authority which would itself be just, whether he seeks this authority in a single person or in a group of many persons selected for this purpose. For each one of them will always misuse his freedom if he does not have anyone above him to apply force to him as the laws should require it. Yet the highest authority has to be just *in itself* and yet also a *man*. This is therefore the most difficult of all tasks, and a perfect solution is impossible. Nothing straight can be constructed from such warped wood as that which man is made of.[59]

Isaiah Berlin rephrased Kant's insight as "out of the crooked timber of humanity no straight thing was ever made."[60] He added, "[e]very situation calls for its own specific policy."[61]

Dealing with a societal problem by fashioning a specific policy, or, more ambitiously, by devising a new way of thinking about property, is daunting even for the best-intended person. The complexity of knowledge required, including knowledge particularized to discrete localities and trades, creates a huge information problem.[62] For that reason, it a fatal conceit that a top-down decisionmaker will calculate correct answers.[63] Also, much relevant information is in the form of tacit knowledge in the eye or hand of its possessor, and not readily transmissible to others.[64] Even if policymakers were omniscient, the

---

> combined with the belief . . . that governing is a specific and limited activity, namely the provision and custody of general rules of conduct, which are understood, not as plans for imposing substantive activities, but as instruments enabling people to pursue the activities of their own choice with the minimum frustration . . . .

Id. at 169-84.

59. Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, in POLITICAL WRITINGS 41, 46 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. Cambridge University Press 1991).

60. ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 170 (1969).

61. ISAIAH BERLIN, *Political Ideas in the Twentieth Century*, *in* FOUR ESSAYS ON LIBERTY, *supra* note 60, at 1, 39-40.

62. *See generally* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

> The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess.

Id. at 519.

63. *See generally* F.A. HAYEK, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM 27 (W.W. Bertley III ed., 1988) (asserting that the notion that centralized planning could coordinate satisfying the needs of entire societies demonstrated the intellectual's tendency toward "the fatal conceit that man is able to shape the world around him according to his wishes").

64. *See* MICHAEL POLANYI, *The Logics of Tacit Inference*, *in* KNOWING AND BEING 138, 141-

assumption that private property owners are self-serving, but government officials and employees necessarily act for the public good is an example of the nirvana fallacy. The fact that all are of the same crooked timber leads each to similar temptations.

Public choice economics, which considers legislation and rulemaking from an economic perspective, finds that legislators, executive branch officials, and agency administrators are motivated by the same types of incentives as their counterparts in the private sector. It concludes that the very regulatory agencies and other bureaucratic institutions that were designed to overcome failures in the marketplace are themselves subject to the similar failures.

An essential element of public choice is the economic (or "interest group") theory of law. Under this view, "legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare."[65] Legislators at the federal, state, and local levels are in a position to supply new laws (or repeal existing ones). Likewise, regulators at all levels of government have the ability to manufacture and revoke rules and regulatory interpretations.

Representatives of numerous interest groups demand favors that officials can supply. "[M]arket forces provide strong incentives for politicians to enact laws that serve private rather than public interests, and hence statutes are supplied by lawmakers to the political groups or coalitions that outbid competing groups."[66] Ironically, the existence of orderly legislative procedures and independent judges promotes such special interest group bargaining, because the existence of the same augur against any easy change in the structure of benefits once interest groups have obtained them.[67]

One might assume that in a democracy large and widely dispersed groups should carry the day. However, due to the large costs associated with organizing and coordinating large groups of people and the small amount at stake for any single member of the group, such organization is utterly impractical. As Mancur

---

42 (Marjorie Grene ed., 1969) (explaining that personal knowledge includes a tacit dimension, i.e., it is "an *actual knowledge* that is indeterminate, in the sense that its content *cannot be explicitly stated*").

65. Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982). *But see* Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148-53 (1977-78).

66. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 (1986).

67. *See, e.g.*, William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975). "The element of stability or continuity necessary to enable interest-group politics to operate in the legislative arena is supplied, in the first instance, by the procedural rule of the legislature, and in the second instance by the existence of an independent judiciary." *Id.* at 878. For a brief overview of current approaches to interest group theory, see generally Paul J. Stancil, *Assessing Interest Groups: A Playing Field Approach*, 29 CARDOZO L. REV. 1273 (2008).

Olson argued in his classic *The Logic of Collective Action*, "unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, *rational, self-interested individuals will not act to achieve their common or group interests*."[68]

Concentrated interest groups engage in rent seeking,[69] a term which originally referred to appropriating the income that could be derived from a parcel of land, but which now largely is used in connection with efforts to exact the value of government-created monopoly privileges. Often, these privileges themselves become "regulatory property."[70] New York City taxi medallions, for example, are pieces of tin traded for hundreds of thousands of dollars only because cars not bearing them are forbidden to cruise the streets for passengers for hire.[71]

Proponents of markets often speak of "government failure," including the proclivity of regulation to be imposed or threatened for the self-serving purposes of legislators seeking contributions or votes. Classic American examples of rent seeking include *Williamson v. Lee Optical of Oklahoma, Inc.*[72] and *United States v. Carolene Products Co.*,[73] which upheld statutes suppressing alternatives to established businesses. "[T]he Supreme Court has consistently held that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest."[74]

Proponents of government action, on the other hand, remind us of "market failures." Market actors have a proclivity to externalize their costs (such as air pollution) by inflicting them on others.[75] Regulatory proponents also assert that

---

68. MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2 (1965).

69. Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967), *reprinted in* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 39 (James M. Buchanan et al. eds., 1980). The specific term "rent seeking" was coined by Anne Krueger. *See* Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974), *reprinted in* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY, *supra*, at 51.

70. Bruce Yandle & Andrew P. Morriss, *The Technologies of Property Rights: Choice Among Alternative Solutions to Tragedies of the Commons*, 28 ECOLOGY L.Q. 123, 124 (2001).

71. *Id.* at 144 n.52.

72. 348 U.S. 483, 491 (1955) (upholding an Oklahoma statute prohibiting opticians from replacing broken lenses without a new eye examination and imposed at the behest of prescribers).

73. 304 U.S. 144 , 153 n.4 (1938) (asserting that civil rights are to be distinguished from property rights, and that the former are preferred rights). The statute upheld in *Carolene Products* forbade the sale of "filled milk," which was skim milk with coconut oil added. *Id.* at 145. The product did not pose a health risk and was desired by its primarily lower-income consumers as a nutritious substitute for whole milk. The tale behind its suppression by the dairy industry is told in Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397.

74. Powers v. Harris, 379 F.3d 1208, 1220 (10th Cir. 2004).

75. *See, e.g.*, David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619, 661-62 (1994) (asserting that in the correction of negative externalities destructive to the environment the "conscious rationality of bureaucrats replaces the will of market actors").

market economies "may produce unacceptably high levels of inequality of income and consumption,"[76] and that "[d]iatribes against government forget the many successes of collective action over the last century."[77]

Another fundamental problem with transformative law is that presumably it is intended to enhance social welfare, which supporters might assume is facilitated by government ordering of economic and social activity. However, we cannot aggregate individual preferences devise normative criteria,[78] because without a "clear majority" favoring one policy over others, there is no "rational means of aggregating individual preferences."[79]

C. Burke, Oakeshott, and Ellicksonian Order

Given the problems of government decisionmakers not having complete information and often acting through self-interest previously noted,[80] what should our posture be towards "transformative property?"

We might start by being mindful of the law of unintended consequences, which suggests that we never can modify just one aspect of a complex system. In that light, it is incumbent that those seeking to transform property first analyze present law in its full context and with analytic empathy. "Otherwise, scholars risk unwittingly violating a maxim that applies as much to scholarship as to medicine: First, do no harm."[81]

Other things being equal, long-established property regulations are preferable.[82] Tradition can serve as an anchor stabilizing the legal system and property rights in the face of sometimes-faddish change. As Russell Kirk argued, "[c]ustom, convention, and old prescription are checks upon both man's anarchic impulse and upon the innovator's lust for power."[83] Tradition has a hold on the affections of people that increase the legitimacy of institutions. It might be, for instance, that the constitutional doctrine of originalism, "in emphasizing reference to the historical document and the meaning or intentions of famous Framers, can evoke emotional responses that alternatives to originalism cannot

---

76. PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 37 (16th ed. 1998).

77. *Id.* at 39.

78. *See* DENNIS C. MUELLER, PUBLIC CHOICE II 2-3 (1989).

79. Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1222 (1994).

80. *See supra* Part I.B.

81. Roger Conner & Patricia Jordan, *Never Being Able to Say You're Sorry: Barriers to Apology by Leaders in Group Conflicts*, 72 LAW & CONTEMP. PROBS. 233, 259-60 (2009).

82. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 64 (2000) ("A rule that has been around a long time and is relatively unchanging is more likely to be understood because actors . . . are more apt to have encountered the rule in the past and to have made some previous investment in comprehending the rule.").

83. RUSSELL KIRK, THE CONSERVATIVE MIND: FROM BURKE TO ELIOT 7-9 (Regnery, 7th ed. 2001) (1953).

directly match."[84]

Edmund Burke, Michael Oakeshott, and others have argued against an overly narrow conception of reason in law and government.[85]

> For Burke and Oakeshott, conceptual relationships have little to do with how customs and traditions function in the real world. Because the powers of human reason are severely limited, all but the most intellectually gifted are incapable of engaging in sustained, rigorous analysis or of thinking through problems without falling into error. The dilemmas of human existence are particularly resistant to rational analysis because social practices and traditions are not derived from first principles, but evolve over time by trial and error. Human action in society and politics operates not primarily through reasoning, but through adherence to prescriptive roles, customs, and habits continuously adjusted to the messy demands of day-to-day living. The test of behavioral rules is thus whether they work well in the real world as guides for human interaction rather than whether they conform precisely to syllogistic demands.[86]

Even Justice Holmes might not have been as set against the use of tradition in law as generally is supposed.[87] Professor Hanoch Dagan recently asserted that Holmes' quarrel with "blind imitation of the past" relates not to serious examination of tradition,[88] but rather to blind adherence to it, as opposed to what Holmes termed "enlightened scepticism."[89]

In discerning fair and viable approaches to property law, an excellent starting place is the scholarship of Robert Ellickson. In a recent celebration of his work,[90] Professor Carol Rose described as a core attribute Ellickson's "skepticism about government of intervention—specifically zoning," and how "this kind of

---

84. R. George Wright, *Originalism and the Problem of Fundamental Fairness*, 91 MARQ. L. REV. 687, 689 (2008) (discussing also Walter Bagehot's distinction between the "efficient parts" of the English Constitution and the "dignified parts," which Bagehot thought tended to "excite and preserve the reverence of the population." WALTER BAGEHOT, THE ENGLISH CONSTITUTION 7 (Miles Taylor ed., Oxford Univ. Press 2001) (1867)).

85. Wright, *supra* note 84, at 690 n.18 (citing, inter alia, EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 96-97 (L.G. Mitchell ed., Oxford Univ. Press 1999) (1790); *see also* MICHAEL OAKESHOTT, RATIONALISM IN POLITICS (1962)).

86. Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059, 1069 (2005).

87. Dagan, *supra* note 25, at 653.

88. Holmes, *supra* note 23, at 469 ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").

89. Dagan, *supra* note 25, at 653 (quoting Holmes, *supra* note 23, at 469).

90. Carol M. Rose, *Of Natural Threads and Legal Hoops: Bob Ellickson's Property Scholarship*, 18 WM. & MARY BILL RTS. J. 199 (2009).

governmental action is administratively costly; that it is ham-handedly overprotective against nuisances; that it is rife with special interest favoritism; and perhaps most important, that it often has a number of damaging third-party effects, particularly in reducing housing opportunities for families of modest means."[91] Along with this was his "preference for legal structures that can promote private ordering."[92]

If top-down regulation, for which Ellickson's non-complimentary term is "legal centralism,"[93] is undesirable, he suggests other, more workable alternatives. These included measures to streamline private land use covenants and a reorganization of nuisance law to permit owners "to find their own solutions to local land-use conflicts."[94] Ellickson's dislike of centralism does not imply that he disliked governing societal institutions. In particular, he noted that a robust system of property was indeed "accurately characterized" as a public good.[95]

More broadly, Professor Rose noted, Ellickson promoted "'normalcy,' or ordinary neighborliness, as a baseline standard of behavior among property owners; he proposed that ordinary activities be left alone, that subnormal activities pay their way via liability rules, and that, if possible, supernormal activities be rewarded."[96] She concluded by describing the regime suggested by Ellickson's work as "a kind of restrained, thin legal order—an unintrusive legal frame that allows people to weave their own quite predictable, but good-natured, patterns of order."[97]

In Ellickson's best-known work, *Order Without Law*,[98] and in his recent book *The Household*,[99] he discussed how natural ordering tends to promote bottom-up

---

91. *Id.* at 200-01 (citing Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 693-705 (1973)).

92. *Id.* at 201.

93. *Id.* at 199. The rise of centralism continues, in matters large and small. *See, e.g.*, Christina S.N. Lewis, *Rents Signal Rise of D.C., Fall of N.Y.*, WALL ST. J., Jan. 8, 2010, at A1 ("The office market in Washington, D.C., is poised to topple New York as the nation's most expensive, reflecting the declining fortunes of the nation's financial center and the government expansion under way in the U.S. capital.").

94. Rose, *supra* note 90, at 201 (citing Ellickson, *supra* note 91, at 761-79).

95. Robert C. Ellickson, *Property in Land*, 102 Yale L.J. 1315, 1365 & n.249 (1993) (describing owner-created mechanisms for governing land-use relationships and attributing characterization to James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL'Y 325, 338-39 n.44 (1992) and Carol M. Rose, *Property as Storytelling*, 2 YALE J.L. & HUMAN. 37, 51-52 (1990)).

96. Rose, *supra* note 90, at 201.

97. *Id.* at 206.

98. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 1 (1991) (illustrating that rural neighbors often resolve their disputes cooperatively without reference to formal law); *see also* Ellickson, *supra* note 95 (describing owner-created mechanisms for governing land-use relationships).

99. ROBERT C. ELLICKSON, THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH

institutions for cooperation in land use, both within the community and within the household itself. Thus, Ellicksonian relationships are based upon social norms and ritual behaviors, as opposed to resting on legal obligation.[100] The interaction of the web of such relationships with the individuals who reside within them comprises what sociologist Erving Goffman referred to as the individuals' moral careers.[101]

Although the efficacy of affordable housing is discussed later in this Article,[102] it is useful to note here the harm that inclusionary zoning does to the moral careers of neighborhood residents. A few low- and moderate-income people obtain middle- or upper middle-class housing at low cost, as beneficiaries of inclusionary zoning and similar subsidy schemes. Many others, who are similarly situated in life to those lucky beneficiaries, themselves aspire, and often work hard, to obtain similar housing. Undoubtedly, some find in the selection process the moral caprice of their ostensible betters.

For decisionmakers higher up the socio-economic scale, distinctions among the underclass, the working poor, and the lower rungs of the middle class seem of little import. Likewise, the differences between those possible recipients of largess who have multiple out-of-wedlock children, addictive behaviors, and inability to hold a job, and possible recipients with low incomes but who make valiant attempts to adhere to middle-class norms, may seem to have lost their salience. Given such social institutions, it is difficult for those striving to improve their condition within what we deem substandard neighborhoods to feel that their achievements are respected or to persevere.[103]

(2008).

100. *See e.g.*, Geoffrey P. Miller, *The Legal Function of Ritual*, 80 CHI.-KENT L. REV. 1181, 1183 (noting that, although law exerts coercive force through state-imposed fines and imprisonment, social norms exert ex post controls through mechanisms such as gossip and shunning individuals who act badly, while ritual elicits ex ante acceptance of assigned social roles).

101. ERVING GOFFMAN, *The Moral Career of the Mental Patient*, *in* ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 125, 168 (1961). "Each moral career, and behind this, each self, occurs within the confines of an institutional system, whether a social establishment such as a mental hospital or a complex of personal and professional relationships."

102. *See infra* Part IV.B.

103. *See* Gertrude Himmelfarb, *Comment*, *in* WORK AND WELFARE 77, 82-83 (Amy Gutmann ed., 1998) (suggesting the recent welfare policy attempted, unsuccessfully, to avoid moral distinctions and judgments); *see also* GERTRUDE HIMMELFARB, THE DE-MORALIZATION OF SOCIETY: FROM VICTORIAN VIRTUES TO MODERN VALUES 249 (1994).

> Individuals, families, churches, and communities cannot operate in isolation, cannot long maintain values at odds with those legitimated by the state and popularized by the culture. It takes a great effort of will and intellect for the individual to decide for himself that something is immoral and to act on that belief when the law declares it legal and the culture deems it acceptable. . . . Values, even traditional values, require legitimation.

Id. at 247-48.

As Howard Husock put it, "Why, after all, should a small minority of families gain amenities and low rent, not because they've worked hard and improved their station but because of a combination of need and luck?"[104] After all, "[p]oor neighborhoods historically were places where many small-time landlords owned modest homes and rented out apartments, often living on the premises. Ownership—or the hope of it—is the surest incentive to improve and maintain one's neighborhood."[105]

D. Who Transforms the Transformers?

The Roman poet Juvenal asked "*quis custodiet ipsos custodes?*"[106] In any society where officials are entrusted with paternal powers, the question of "who will watch the watchers" looms. As noted earlier, it was a central issue for Immanuel Kant.[107] Plato dealt with it through the "noble lie," the inculcation of belief in the ruling class that they were born to rule the city, and would do so as a disinterested public service.[108] In our time, the noble lie takes the form of the Progressive Era belief that disinterested experts could supplant untidy and often-venal politics.[109] During the three decades before United States entry into World War I, which terminated the Progressive era, "reformers eroded the nineteenth-century belief that private litigation was the sole appropriate response to social wrongs."[110] In its place, an array of federal and state regulatory agencies became primarily responsible for social control over much of the economy.[111]

One factor fueling deference to expertise is evidence that people are not rational decisionmakers. Seventh Circuit Court of Appeals Judge Richard Posner asserted that rational choice simply is "choosing the best means to the chooser's ends,"[112] but Professor Daniel Farber argues that Posner's "broad and seemingly innocuous definition turns out to be surprisingly powerful. It implies that people

---

104. Howard Husock, *Back to Private Housing*, WALL ST. J., July 31, 1997, at A18.

105. *Id.*

106. Juvénal, *Satire* VI, ll. 347-48.

107. Kant, *supra* note 59, at 46 ("[E]ach one of them will always misuse his freedom if he does not have anyone above him to apply force to him as the laws should require it.").

108. PLATO, THE REPUBLIC, *e.g.*, ¶¶ 414b-15c (Richard W. Sterling & William C. Scott trans., W.W. Norton & Co., 1985).

109. *See, e.g.*, David E. Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, 72 LAW & CONTEMP. PROBS. 177, 179-80 (2009) ("As elitists, the progressives believed that intellectuals should guide social and economic progress, a belief erected upon two subsidiary faiths: a faith in the disinterestedness and incorruptibility of the experts who would run the welfare state they envisioned, and a faith that expertise could not only serve the social good, but also identify it.").

110. Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 61 J. ECON. LITERATURE 401, 401 (2003).

111. *Id.*

112. Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1551 (1998).

have a coherent set of preferences as a basis for formulating goals, that they maximize their utility given these preferences, and that they make optimal use of available information."[113] Farber adds, "But while people are not always economically rational, their behavior is not random either. Rather, people display well-documented cognitive biases, use heuristics that do not always produce correct results, occasionally lack the willpower to carry out their plans, and sometimes sacrifice their own interests to achieve 'fairness.'"[114]

A popular recent approach to melding recognition of cognitive biases with regard for personal autonomy is "soft paternalism." This movement, popularized by Richard Thaler and Cass Sunstein's *Nudge: Improving Decisions About Health, Wealth, and Happiness*,[115] derives from research in behavioral economics indicating cognitive errors and biases that indicate people will make systematic errors in making decisions pertaining to their own welfare.[116] It then proceeds to "nudge" people to make decisions in their own interests, using devices such as requiring that they choose to opt out of participating in employer-sponsored retirement plans, instead of choosing to opt in.[117]

However, soft paternalism has troubling implications. Who will decide what is good for an individual and what biases ought to be corrected? In short, "who will nudge the nudgers?"[118] Moreover, as Professor Russell Korobkin observed, the very same tools might be applied to individual choices for benefitting not their own welfare, but rather the expected utility of society as a whole.[119] In their critique of the "new paternalism,"[120] Professors Mario Rizzo and Douglas Whitman suggest another source of possible abuse:

> The insights of the slippery-slope literature suggest that new paternalist policies are particularly subject to expansion. We argue that this is true even if policymakers are rational. But perhaps more importantly, we argue that the slippery-slope threat is especially great if policymakers are not fully rational, but instead share the behavioral and cognitive biases attributed to the people their policies are supposed to help. Consequently, accepting new paternalist policies creates a risk of accepting, in the long run, greater restrictions on individual autonomy

---

113. Farber, *supra* note 44, at 282.

114. *Id.* at 280 (adding that what is new about these cognitive biases is "their rigorous documentation by social scientists").

115. THALER & SUNSTEIN, *supra* note 43.

116. *See, e.g.*, Colin F. Camerer, *Prospect Theory in the Wild: Evidence from the Field*, *in* CHOICES, VALUES, AND FRAMES 288, 295-98 (Daniel Kahneman & Amos Tversky eds., 2000).

117. THALER & SUNSTEIN, *supra* note 43, at 109.

118. Jonathan B. Wiener, *Best Cass Scenario*, 43 TULSA L. REV. 933, 944 (2008).

119. Russell B. Korobkin, *Libertarian Welfarism* (Dec. 8, 2009), *available at* http://ssrn.com/abstract=1361071.

120. Mario J. Rizzo & Douglas Glen Whitman, *Little Brother Is Watching You: New Paternalism on the Slippery Slopes*, 51 ARIZ. L. REV. 685 (2009).

than have heretofore been acknowledged.[121]

Whether one believes that transforming law is for the benefit of those affected, society, or the transformers themselves,[122] the nudging model presumes institutional competence. That presumption might be wrong.

Complex organizations might be susceptible to what Professors Geoffrey Miller and Gerald Rosenfeld term "intellectual hazard."[123] In their introduction, Miller and Rosenfeld described two navigation teams planning a NASA Mars mission, and a hospital team preparing a patient for an amputation. The navigation teams inadvertently used different systems of measurement, and the surgeon cut off the wrong leg.

> Each of these disasters resulted from a common, dangerous, but little-recognized phenomenon. The events in question took place within complex organizations—a bureaucratic agency with numerous teams and subcontractors working on the same project, a hospital with its network of physicians, nurses, equipment, and systems for medical and financial record-keeping and control. The mistakes that occurred were elementary—so elementary that if a single person had been carrying out the task, rather than a complex team, they never would have happened. Yet the consequences of those mistakes were devastating[124]

"The problem in both cases," the authors assert, "was the failure of the complex organization to properly acquire, communicate, analyze, and implement information pertinent to risk and crucial to the success of the operation."[125] Although the thesis of their paper is that failures in processing and transmitting risk-related information helped precipitate the breakdown of sophisticated and technologically advanced financial markets, the implications for top-down planning in general are unmistakable.[126]

---

121. *Id.* at 688.

122. *See, e.g.*, Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617, 621-22 (2003) ("According to [public choice] theory, elected officials, being rational actors like everyone else, are primarily motivated by the desire to maximize their individual self-interest. This means that legislators and the chief executive will try to maximize their chances of being re-elected and thereby retain their desirable positions, while administrators will attempt to maximize the budget of their agencies . . . ." (citation omitted)).

123. Geoffrey P. Miller & Gerald Rosenfeld, *Intellectual Hazard: How Conceptual Biases in Complex Organizations Contributed to the Crisis of 2008* (Nov. 4, 2009), *available at* http://ssrn.com/abstract=1499789.

124. *Id.* at 2.

125. *Id.* at 2-3; *see also* Holmes, *supra* note 23, at 459 ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.").

126. The results of the conceit that mind-numbingly complex financial instruments could hedge all risks ought to be predictable. *See supra* notes 62-64 and accompanying text.

An additional problem with the noble lie results from increasing separation of law and morality resulting from acceptance of the Realist worldview. This is manifested, for instance, in a vast attenuation of the sense of obligation that corporate leaders once felt towards the communities in which their firms first grew and prospered.[127] As first-year law students learn, the operative view in contract is not keep your word, but rather go back on your word when that would constitute an efficient breach. The logic of "efficient breach" goes beyond the inability of the victim to sue for specific performance and might even extend to permitting the party in breach to sue the victim to recover what otherwise might have been the victim's losses had the transaction been consummated.[128]

Whether a breach is efficient or not, the proclivity of Holmes' "bad man" to look solely at possible punishment as a guide to the legality of his actions[129] tends to displace any concerns as to the morality of his actions, as well. Most ordinary consumers have honored their debts, even where breach would be more expedient. A recent paper by Professor Brent White suggests that homeowners whose mortgage debt substantially exceeds fair market value generally do not walk away, largely because of feelings of shame and guilt about foreclosure.[130]

> [T]hese emotional constraints are actively cultivated by the government and other social control agents in order to encourage homeowners to follow social and moral norms related to the honoring of financial obligations—and to ignore market and legal norms under which strategic default might be both viable and the wisest financial decision. Norms governing homeowner behavior stand in sharp contrast to norms governing lenders, who seek to maximize profits or minimize losses irrespective of concerns of morality or social responsibility. "Such norm asymmetry" systematically disadvantages borrowers in negotiations with lenders and has led distributional inequalities in which individual homeowners shoulder a disproportionate burden from the housing collapse.[131]

---

127. *See, e.g.*, ROBERT B. REICH, THE FUTURE OF SUCCESS (2001).

128. *See* Barry E. Adler, *Efficient Breach Theory Through the Looking Glass*, 83 N.Y.U. L. Rev. 1679, 1679-82 (2008).

> A party in breach of contract cannot sue the victim of breach to recover what would have been the victim's loss on the contract. The doctrinal rationale is simple: A violator should not benefit from his violation. This rationale does not, however, provide an economic justification for the rule. Indeed, efficient breach theory is founded on the proposition that a *breach of contract need not be met with reproach*. Yet the prospect of recovery by the party in breach—that is, the prospect of negative damages—has received scant attention in the contracts literature.

Id. at 1679 (emphasis added).

129. Holmes, *supra* note 23, at 460-61.

130. Brent T. White, *Underwater and Not Walking Away: Shame, Fear and the Social Management of the Housing Crisis* (Feb. 2010), *available at* http://ssrn.com/abstract=1494467.

131. *Id.* (abstract).

Given the problems of personal character and lack of complete information endemic to transforming rules, we should approach "transformation" in property law with trepidation.

II. PRELUDE TO TRANSFORMATION—THE "DISINTEGRATION" OF PROPERTY

The calls for "transformative activity" and creation of "new categories concerning the nature and uses of property"[132] suggest the potential for unbounded change. That would require removal of the undergirding of traditional property, and the reestablishment of property in forms that the transformers find congenial. The process resembles the one employed by what Erving Goffman referred to as "total institutions," such as prisons and military boot camps, which systematically tear down and rebuild the values and modes of thinking of those who enter them.[133]

A. The Theoretical Turn to Fragmented Property

1. Traditional Views of Property as an Integrated Concept.—Laypersons, still living in a pre-Hohfeldian world,[134] think of property as "things."[135] However, lawyers have come to "shun" such talk, and instead speak of "property" abstractly, using metaphors such as "bundles of rights."[136] Traditional understandings of property, however, were richer than mere rights to exclude others.

Despite the modern Manichean distinction between property as thing and bundle of sticks, it is possible to have an integrated theory of property that "maintains that the elements of exclusive acquisition, use, and disposal represent a conceptual unity that together serve to give full meaning to the concept of property."[137]

---

132. *See supra* note 7 and accompanying text.

133. Erving Goffman, *On the Characteristics of Total Institutions*, in ASYLUMS, *supra* note 101, at 1-124. Total institutions are "defined as a place of residence and work where a large number of like-situated individuals, cut off from the wide society for an approciable period of time, together lead an enclosed, formally administered round of life." *Id.* at xiv.

134. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (establishing a taxonomy of fundamental jural relations); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 724-34 (1996).

135. *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26 (1977) (asserting that "one of the main points of the first-year Property course is to disabuse entering law students of their primitive lay notions regarding ownership. . . . Instead of defining the relationship between a person and 'his' things, property law discusses the relationships that arise *between people* with respect to things.").

136. Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1558 (1982).

137. Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV.

The Greek understanding of property stressed the right of use, and Roman theory "emphasiz[ed] the substantive elements of acquisition, use and disposal," thus "leaving exclusion as only a logical corollary" of property.[138] More generally, "[w]hen philosophers, scholars, and jurists throughout history have analyzed and defined the concept of property, they have returned again and again to the substantive possessory rights—the rights of acquisition, use and disposal—and the right to exclude is left as only a corollary of these three core rights."[139]

In Anglo-American tradition and law, William Blackstone famously described property rights as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[140] But this was an opening gambit, a canonical strategy of property talk that unfolded in a much more nuanced understanding that one's rights were limited by nuisance and other common law protections of the rights of others.[141]

William Pitt celebrated the right of even the most humble to bar their doors to the King.[142] Undoubtedly the best known to the American Framers of the English and Scottish Enlightenment thinkers, John Locke, declaimed in his *Second Treatise of Government* on "lives, liberties, and estates, which I call by the general name, '*property.*'"[143] In the Lockean tradition, John Adams declared that "[p]roperty must be secured or liberty cannot exist."[144]

2. Contemporary Scholarship.—In contemporary property scholarship and teaching, property is looked at as a bundle of rights and correlative obligations,[145] and as a series of incidents of ownership.[146] Taken literally, there is nothing

---

371, 376 (2003).

138. *Id.* at 391.

139. *Id.* at 392.

140. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (facsimile ed. 1979) (1765-69).

141. Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 601, 603-04 (1998).

142. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1358 (quoting William Pitt, *Speech on the Excise Bill*, in 15 HANSARD, PARLIAMENTARY HISTORY OF ENGLAND 1307 (1753-65)).

> The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake-the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

Id.

143. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 123 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690) (emphasis added).

144. 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed. 1851), *quoted in* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 388 (1996).

145. *See* Hohfeld, *supra* note 134, at 28-59.

146. *See* A.M. Honoré, *Ownership, in* OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest

instrumental in this, because traditional property is the aggregate of the sticks in the bundle and incidents of ownership. However, as my colleague Eric Claeys recently observed, many judges and scholars "use the bundle metaphor as conceptual shorthand for an implicit normative claim: that policy analysis may treat property as an instrument for directly promoting immediate policy goals, without disrupting property's foundational functions."[147]

Professor Thomas Grey's well-known monograph *The Disintegration of Property*, asserted that the term "private property" has no uniform meaning in ordinary speech.[148] Professor Francesco Parisi argued that "entropy in property" causes property to spiral through "a one-directional inertia" that fragments property, while "reunifying fragmented property rights usually involves transaction and strategic costs higher than those incurred in the original deal."[149]

However, even apart from normative claims that may be implicit in the "bundle" approach, subtle cognitive effects might arise from breaking down "property" into numerous slices and subjecting each to separate analysis.[150] As Professor Richard Epstein notes, Grey's rejection of the concept of property as things "fosters an unwarranted intellectual skepticism."[151] Grey "rejects a term that has well-nigh universal usage in the English language because of some inevitable tensions in its meaning, but he suggests nothing of consequence to take its place."[152] Epstein adds, "[e]liminate the sense of the term 'private property,' and it becomes easy to knock out the constitutional pillars that support the institution, thereby expanding both the size and discretionary power of government."[153]

Indeed, the thesis of Michael Heller's *The Tragedy of the Anticommons*,[154] and its more general reiteration in *Gridlock*,[155] is that there is too much private property. Although over-fractionalization of property surely is an important concern, over-agglomeration of government regulation is as well. In any event, we might question whether gridlock is a major source of social dislocation, in

---

ed., 1961).

147. Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617, 619 (2009).

148. Thomas C. Grey, *The Disintegration of Property*, *in* NOMAS XXII: PROPERTY 69, 70-71 (J. Roland Pennock & John W. Chapman eds., 1980).

149. Francesco Parisi, *Entropy in Property*, 50 AM. J. COMP. L. 595, 595-96 (2002).

150. The effect might be akin to the desensitization that might result from showing a jury numerous repetitions of individual frames of filed or videotaped acts of violence. *See, e.g.*, Deborah L. Mahan, *Forensic Image Processing*, 10 CRIM. JUST. 2, 8 (1995).

151. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 21 (1985).

152. *Id.*

153. *Id.*

154. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

155. MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES (2008).

light of the economic distortions produced by government subsidy programs and mandated rigidities in markets, both pointing to the fact that there is too little private property.[156]

Reinforcing his theme, Heller makes much the same point in discussing the problem of property rights that have become dysfunctional through division by their owners.[157] He notes that fragmentation "may operate as a one-way ratchet."[158] "Like Humpty Dumpty, resources prove easier to break up than to put back together."[159]

In *The Tragedy of the Anticommons*, Heller found that rights in Moscow stores were fractionalized and scattered to the extent that a multiplicity of veto rights precluded the stores use.[160] It would be up to the State to break the ensuing gridlock.[161] But, like Voltaire's Holy Roman Empire,[162] the utility of Heller's felicitous phrase is dependent upon the assumption what we are talking about what accurately might be called a commons, that the veto rights he postulates are antithetical to the commons, and, finally, that the playing out of the situation is in fact tragic.

All of this might, or might not, be true. The fact that the surfeit of fractional property rights in Moscow that Heller describes was created during the frenzied dying days of the unlamented Soviet Union and their immediate aftermath gives us no reason to assume that their faults could be attributed to a robust and indigenous system of private property that has grown, and had been honed, through accretion under the common law.[163] As an empire collapses, the control and ownership of vast resources come up for grabs. The process is more reminiscent of Herman Melville's wonderful description of fast and loose fish in *Moby Dick* than it is of considered judgment.[164]

---

156. *See* Richard A. Epstein, *Heller's Gridlock Economy in Perspective: Why There is Too Little, Not Too Much, Private Property* (Nov. 13, 2009), *available at* http://ssrn.com/abstract=1505626 (noting, inter alia, rigidities induced by employment regulation and land use restrictions).

157. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1165 (1999).

158. *Id.*

159. *Id.* at 1169.

160. Heller, *supra* note 154, at 633-40.

161. *See* HELLER, *supra* note 155 (broadening and popularizing the anticommons thesis).

162. As Voltaire had observed, the Germans' Holy Roman Empire was "neither holy, nor Roman, nor even an Empire." *See* JOHN G. GAGLIARDO, REICH AND NATION: THE HOLY ROMAN EMPIRE AS IDEA AND REALITY, 1763-1806, at 291 (1980) (citing VOLTAIRE, ESSAI SUR LES MOEURS ET L'ESPRIT DES NATIONS 70 (1769)).

163. *See* Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEG. STUD. 51, 53 (1977) (noting that, where both parties are have an interest in precedent, parties will tend to re-litigate inefficient rules until they are changed).

164. *See* HERMAN MELVILLE, MOBY DICK 331-34 (1st ed. London) (1851) (generalizing on the distinction between "fast fish," specifically whales that had been harpooned so as to belong to a particular ship, even if subsequently adrift, and "loose fish," whales which were in their natural

In the United States, more providently, property arose from different political traditions and popular aspirations.[165] Americans are heirs to the Glorious Revolution of 1688, which affirmed that the king was subject to the rule of law, as well as the English and Scottish Enlightenments.[166] Settlers had been attracted to the American colonies by promises of land in fee simple (allodial title) on generous terms.[167] Both before and after independence fee simple ownership denoted a rejection of feudalism, where one held property of the King.[168]

B. The Redefinition of Property

With the term property assertedly stripped of determinate meaning, it becomes easy to further reduce its potency through what ostensibly are changes in the mechanism for its protection. The seminal work was Guido Calabresi and Douglas Melamed's *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*.[169] By shifting the focus from property to entitlements, which are deemed to be protected by either a "property rule" (injunctive relief) or a "liability rule" (monetary damages), Calabresi and Melamed put property rights in play in a new fashion.[170]

It would seem untenable to have an absolute rule enjoining interference with private property because that would not take into account eminent domain, adverse possession, or the equities of good-faith encroachers.[171] Nevertheless, unless injunctive relief is the norm, the core meanings of property as the rights to use and exclusion of others are vitiated. Some courts have honored the dignity and subjective value inherent in property ownership.[172] Many others have not,

---

state or harpooned in a manner not perfecting a claim. The latter were available to be hunted by all. Melville analogized mortgaged land and serfs to "fast fish," and the rights of man and the America before the arrival of Columbus to "loose fish.").

165. For elaboration, see Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEO. J.L. & PUB. POL'Y 77, 78-82 (2002).

166. *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 12-13 (1985) (noting that the entitlement to property and liberty of which the Framers' generation was "so proud" was not really new but was part and parcel of the historic rights of Englishmen).

167. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 11 (1992).

168. *See* Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 310-16 (1991).

169. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

170. *See id.*

171. *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 54 (2007) (concluding that, if faced with an unintentional encroachment resulting in only slight harm to the plaintiff and grave hardship to the defendant if removal of the encroachment were required, "most American courts today would probably deny injunctive relief and award only damages").

172. *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 160-61 (Wis. 1997)

either because of their own notions of social justice,[173] or the court's calculus that public gains from such intrusions outweigh the private costs.[174] However, the logical outcome of permitting private benefits to trump property rights is to grant any private individual who anticipates a surplus after paying fair market value to the owner the right of private condemnation.[175] Thus, all property becomes no more than Melville's "loose fish."[176]

Another device for the redefinition of property is legislative "ipse dixit."[177] The U.S. Supreme Court noted that property interests are not created by the Constitution.[178] Instead, it utilizes "'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth amendments."[179] As the U.S. Court of Appeals for the District of Columbia Circuit explained:

> The essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement. These mutually reinforcing understandings can arise in myriad ways. For instance, state law may create entitlements through express or implied agreements, and property interests also may be created or reinforced through uniform custom and practice.[180]

> It is an uncontroversial, yet often unarticulated proposition that, in the absence of constitutional, statutory or common law rules, custom and usage may identify and create contract or property rights. Some courts have gone so far as to suggest that rights created by custom may be so robust as to trump positive law or common law.[181]

States may not avoid the need to pay just compensation simply by defining existing property rights out of existence, even as against post-enactment purchasers.[182] The effect of putting "so potent a Hobbesian stick into the

---

(upholding punitive damages for intentional trespass resulting only in nominal damages).

173. *See, e.g.*, State v. Shack, 277 A.2d 369, 371-72 (N.J. 1971) (holding unsolicited visits to migrant farm workers by legal aid and medical workers not trespasses on farmer's land).

174. *See, e.g.*, Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 874-75 (N.Y. 1970) (denying injunctive relief where nuisance resulted from activity benefitting the local economy).

175. *See* Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517 (2009) (advocating private condemnation for private purposes with minimal judicial intervention, so long as the erstwhile condemnor offers just compensation).

176. *See supra* note 164.

177. *See* Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. HAW. L. REV. 533, 555 (2002).

178. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).

179. *Id.* (quoting Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 577 (1972)).

180. Nixon v. United States, 978 F.2d 1269, 1275 (D.C. Cir. 1992) (citations omitted).

181. *Id.* at 1276 n.18.

182. Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001).

Lockean bundle . . . [would be,] in effect, to put an expiration date on the Takings Clause."[183] Despite the Court's admonition, changes in law do have an effect on property.[184] Perhaps even changes in the "regulatory climate" have some effect.[185] The Court heard oral argument on December 2, 2009, in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[186] a case raising the issue of whether the state supreme court's "invoc[ation of] nonexistent rules of state substantive law" constituted a "judicial taking."[187]

C. The Call to Property Transformation

The debate about the right amount of property is analogous to the debate about the right amount of tax. Although the so-called "Laffer Curve"[188] correctly notes that taxes might be raised to the point where tax revenues are decreased, economists generally are dubious that our society has approached such a rate.[189] Likewise, the undisputed existence of over-fractionated private property does not suggest that the anticommons phenomenon is pervasive or more pernicious than overregulation.

Although transformative reformers might suggest that government entitlements *replace* private property, it was not so long ago that legal academia's attention was riveted on the concept that government entitlements are transformed in nature by *becoming* private property. In 1964, the *Yale Law*

---

183. *Id.* at 627.

184. *See, e.g.*, *id.* at 633 (O'Connor, J., concurring) ("Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis."). Justice O'Connor was one of the five-Justice majority. The Court's "investment-backed expectations" test was first enunciated in *Penn Central Transportation, Co. v. City of New York*, 438 U.S. 104, 124 (1978), and most recently has been reaffirmed in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544 (2005).

185. *See* Good v United States, 189 F.3d 1355, 1361-62 (Fed. Cir. 1999) ("In view of the regulatory climate that existed when Appellant acquired the subject property, Appellant could not have had a reasonable expectation that he would obtain [development approval]."). *But see* Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1379 n.3 (Fed. Cir.), *aff'd on reh'g* 231 F.3d 1354 (Fed. Cir. 2000) (noting, referring to *Good*, that circuit rules precluded subsequent panel decisions changing established principles unless affirmed en banc).

186. Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008), *cert. granted sub nom.* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 129 S. Ct. 2792 (2009).

187. *See* U.S. Supreme Court Docket for case 08-1151, *available at* http://www.supremecourt.gov/qp/08-01151qp.pdf.

188. *See, e.g.*, James M. Buchanan & Dwight R. Lee, *Politics, Time, and the Laffer Curve*, 90 J. POL. ECON. 816, 817-18 (1982) (describing the Laffer Curve's asserted inverse relation between tax rates and revenue).

189. *See, e.g.*, Jon Gruber & Emmanuel Saez, *The Elasticity of Taxable Income: Evidence and Implications*, 84 J. PUB. ECON. 1 (2002) (reviewing the literature).

Journal published Charles Reich's *The New Property*,[190] one of the most heavily cited law review articles in history.[191] Although Reich was downplayed as "an example of the scholar who produces a single influential article in his lifetime,"[192] his construct still has appeal.[193]

As previously noted, Mario Cuomo's call that the individuals of the United States become "the family of America" nominally enlarges the concept of the family, but would actually result in its dissolution.[194] Similarly, when Charles Reich advocated that the traditional concept of private property be expanded to include "the new property" of government largess, the ensuing "positive liberty" inevitably would encroach upon the "negative liberty" of individual independence that is buttressed by traditional property.[195]

"Dignity" is a term associated with independence and with some measure of equality.[196] Notions of reconciling material well-being and equality are confounded by the existence of "positional goods," which derive their value from inequality.[197] In particular, "Americans tend to view homes as 'positional' goods, and so have strong desires to purchase homes that place them as high as possible within the homeownership hierarchy."[198] In this context, Professor Nestor Davidson suggested "leveling as a normative frame for property doctrine."[199]

---

190. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

191. *See* Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1548 tbl. 1 (1985) (rating *The New Property* as the fourth most-cited law review article written since 1947); Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 760, 766 tbl. 1 (1996) (rating *The New Property* as the fourth most-cited law review article of all time).

192. William M. Landes & Richard A. Posner, *Heavily Cited Articles in Law*, 71 CHI.-KENT L. REV. 825, 827 (1996).

193. *See, e.g.*, Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 U. COLO. L. REV. 1123, 1132-41 (1997) (describing "nonwhiteness as new property").

194. See *supra* note 54 and accompanying text.

195. *See* BERLIN, *supra* note 60, at 122-24 (noting that "negative liberty" from interference by others is a right that might be universally enjoyed, but that "positive liberty" to receive nurture from others necessarily imposes correlative obligations upon them).

196. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 320-21 (1983) (asserting that individuals are entitled to such wherewithal as is necessary for participation as full members of society).

197. *See* Jonathan Haidt et al., *Hive Psychology, Happiness, and Public Policy*, 37 J. LEGAL STUD. S133, S151 (2008) ("Many of the goods that are known to contribute to well-being, such as wealth and high status, are positional goods: relative position matters more than absolute levels, so competitors are trapped in a zero-sum game." (citing ROBERT H. FRANK, LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS (1999)).

198. Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 836 n.58 (2009) (citing Robert H. Frank, *Positional Externalities Cause Large and Preventable Welfare Losses*, 95 AMER. ECON. REV. 137 (2005)).

199. Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 802 (2009).

> It is important to avoid the simplistic temptation to think that tinkering with the structure of property can significantly change underlying individual and cultural norms. Nonetheless, recognizing the intricate intertwining of doctrine and status signaling suggests that the design of property law may be a way to temper some status races.[200]

Professor Davidson attributes Susette Kelo's "anxiety" to her forced relocation to a place of lower or uncertain status, the "status anxiety" of small-time landlords to a shift in the balance of power resulting from the landlord-tenant "revolution" of the 1960s and '70s, and so on.[201] But re-attributing pain resulting from deprivation of property to deprivation of status makes no more sense than re-characterizing a mugging as an assault merely on dignity.

Many people purchase large homes not to obtain heightened "status," but rather in order to make visits from children and grandchildren more attractive, to leave a family inheritance, or, perhaps, to endow a chair at a university. Landed wealth and family businesses have been the source of much charitable giving. It was the steel magnate and philanthropist Andrew Carnegie who declared: "'The man who dies thus rich dies disgraced.'"[202]

On the other hand, not all who would commandeer private property for ostensible public benefit do so for altruistic reasons. Urban redevelopers, for instance, are known to favor redevelopment, and to contribute to like-minded political candidates.[203] One is reminded of the popular Hank Williams song about televangelists who importune that we send our money to God, but who give us their address.[204]

D. Transforming Property: Who Steers and Who Rows?

With the term "property" purportedly stripped of any intrinsic meaning, those desiring transformation through government action would have a clear field. Furthermore, government could leverage the social impact of its actions through use of private partners. In their influential book *Reinventing Government*,[205] David Osborne and Ted Gaebler urged that private actors be enlisted to "row" as government officials "steered."[206] Similarly, Professor Robert Ahdieh has

---

200. *Id.* at 763 (citing Minogue, *supra* note 1). Minogue's advice remains sound.

201. *Id.* at 810-11.

202. ANDREW CARNEGIE, *The Gospel of Wealth, in* THE GOSPEL OF WEALTH AND OTHER TIMELY ESSAYS 1, 17 (1933).

203. *See infra* Part III.D (discussing pretextuality in urban redevelopment).

204. "Now there are some preachers on T.V. with a suit and a tie and a vest / They want you to send your money to the Lord but They give you their address. . . ." HANK WILLIAMS, JR., THE AMERICAN DREAM, *on* HANK WILLIAMS, JR.'S GREATEST HITS, VOL. 1 (Warner Bros./Curb Records 1983), *available at* http://www.mp3lyrics.org/h/hank-williams-jr/american/.

205. DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1992).

206. *Id.* at 30 ("As they unhook themselves from the tax-and-service wagon, [political leaders]

stressed the "coordination functions of the regulatory state."[207]

Although the steer-and-row metaphor is beguiling, it raises troublesome issues of undesirable intrusion and micro-management by government in the activities of private actors assigned to row, and, conversely, in private businesses wresting the helm away from the government.[208]

III. "RIGHT-SIZING" PROPERTY FOR REVITALIZATION AND "SMART GROWTH"

A. The Justification for Government Involvement in Urban Development

The classic reason for government's constraint on the use of private land is protection of public health and safety.[209] In those areas, government regulations substantially, and often unnecessarily, have supplanted common law nuisance.[210] But urban revitalization goes far beyond actions countenanced by traditional police power concerns.

The broad approach to revitalization recently was articulated by Professor John Costonis, who regretted that the Supreme Court's opinion in *Kelo v. City of New London*[211] was so closely associated with economic development and tax revenues.[212]

> [T]he *Kelo* court misconceived the issue before it by framing it as an

---

have learned that they can steer more effectively if they let others do more of the rowing. Steering is very difficult if an organization's best energies and brains are devoted to rowing.").

207. Robert B. Ahdieh, *The Visible Hand: The Coordination Functions of the Regulatory State* (Dec. 9, 2009), *available at* http://ssrn.com/abstract=1522127.

> When it comes to preventing financial crises, developing the infrastructure of the internet, and articulating common standards for high-definition television—to name but a few examples—regulation designed to alter individual payoffs proves to be both unduly costly and inadequately effective. In these and other coordination settings, a regulatory paradigm oriented to group and social dynamics, to expectations and information, and to failures of coordination emerges as a kind of "new regulation."

Id. at 1. This view is consistent with the "New Governance" paradigm. *See supra* Part III.E.

208. *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL. J. ECON. & MAN. SCI. 3 (1971) (asserting that control of the regulation generally is acquired by the regulated industry and operated primarily for its benefit). For relevant examples, see *infra* Part III.D (discussing pretextuality in urban redevelopment).

209. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (stating that land use regulations "must find their justification in some aspect of the police power, asserted for the public welfare").

210. *See* Steven J. Eagle, *The Common Law and the Environment*, 58 CASE W. RES. L. REV. 583 (2008) (advocating restoration of common law nuisance actions to remediate environmental torts); Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833 (2007) (advocating replacement of condemnation of "blighted" parcels by abatement and foreclosure).

211. 545 U.S. 469 (2005).

212. John J. Costonis, *New Orleans, Katrina and* Kelo*: American Cities in the Post–*Kelo *Era*, 83 TUL. L. REV. 395 (2008).

> economic development "higher taxpayer" question. In fact, the problems the project was designed to address . . . engage not only "economic development" but a broad range of conventional urban planning problems that undeniably link the alleviation of these problems to New London's deployment of its eminent domain power.
> . . . Rejuvenation of New London's Fort Trumbull project area was also intended to create a climate of confidence and citizen pride that would stimulate the solution of off-project physical and social planning issues associated with crime, education, housing abandonment, and other planning ills.[213]

Professor Costonis' words seem redolent of *Berman v. Parker*,[214] where Justice William O. Douglas rhapsodized that the public welfare "is broad and inclusive," and that "[t]he values it represents are spiritual as well as physical, aesthetic as well as monetary."[215] It is instructive that *Kelo* was bereft of similar imagery.[216]

Residents of a neighborhood presumably would prefer more civic confidence and beauty, but that only raises the question of why a central government should attempt to revitalize an urban region, or a large city attempt to revitalize a given neighborhood. The answer is not clear.

> By increasing the attractiveness of an area, the central government raises the probability that an individual will want to stay in that area, which in turn increases the degree of investment in social capital. Government support for distressed areas can be seen as a means of subsidizing the positive externalities associated with social capital investment. In principle, it is even possible that government intervention could move the city from the bad equilibrium, where everyone leaves and no one invests, to the good equilibrium, where people stay and invest.
>
> Although there is no doubt that theory can provide an intellectually coherent rationale for supporting declining areas, it is less obvious that the model's conditions for federal government support to be beneficial are met in the real world. After all, providing incentives for geographic stability is a more direct means of promoting social capital investment than propping up declining areas. . . . If human capital investments also create spillovers, and if the returns to human capital are higher outside of declining regions, then propping up those regions will cause a reduction in human capital investment that must be weighed against any gains from social capital investment.[217]

---

213. *Id.* at 427 (footnotes omitted).

214. 348 U.S. 26 (1954) (upholding condemnation of an unblighted parcel in the middle of a southwest Washington, D.C. redevelopment area).

215. *Id.* at 33 (citations omitted).

216. *See* 545 U.S. 469.

217. Edward L. Glaeser & Charles Redlick, *Social Capital and Urban Growth*, 32 INT'L REG'L SCI. REV. 264, 265 (2009).

B. Transformation of Property Through Transformation of Parcels

This Article focuses on attempts to transform property through the transmogrification of existing parcels of land so that they will be harmonious with elements of public infrastructure, such as a transportation system, resulting in the "best fit" between capacity and anticipated needs. That might be a useful aspiration.[218] However, right-sizing has come to mean much more.

Professor Heller's primary concern in *Anticommons*[219] was legal property—the fractionalization of ownership rights in a specified parcel of land. In *Gridlock*, however, that concern broadened, to include fee ownership of small parcels as fractionalized interests in the super parcel he envisioned in their place.[220] He subsequently suggested a mechanism for accomplishing this.[221]

The existence of privately owned parcels that physically are too large would seem most unusual, because underutilized parcels are deterred by property taxes, which are based on highest and best use and by adverse possession, which requires at least some monitoring of vacant land.[222] Mostly, however, owners have sought to take the gains that accrue from subdivision and sale when the time is propitious. As a practical matter, the existence of parcels that are too small for modest buildings is discouraged by land use regulations prescribing minimum sizes of building lots.

Over time, of course, parcels that once were economically viable might become too small to accommodate profitable new uses. In that case, owners have an incentive to buy the lands of neighbors or sell to someone who would consolidate small parcels into large ones. In some cases, owners decline to sell small parcels at market prices. They might be characterized as holdouts who thwart the assembly of socially valuable tracts except on terms giving them the lion's share of assembly gains, or, alternatively, as principled owners whose subjective enjoyment of the land exceeds their desire for lucre. When holdout motivation is alleged, for genuine or pretextual reasons, localities and redevelopers might invoke the anticommons principle and urge that the land be condemned, usually for retransfer for private economic revitalization.

---

218. *See, e.g.*, Allen D. Biehler, Address at the Pennsylvania Planning Association 2005 Annual Conference 9-13 (2005), *available at* http://www.planningpa.org/presentations/05/puzzle.pdf (noting that "[a] 'best fit' transportation program or project (all modes) that meets transportation needs and considers: community and regional goals, quality of life, economic development initiatives, fiscal constraint, [and] social/environmental issues").

219. Heller, *supra* note 154.

220. HELLER, *supra* note 155.

221. Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465 (2008) (discussing buy-out schemes for consolidation of parcels).

222. An exception has been the breakup of the feudal incidents of large colonial proprietors at the time of the American Revolution. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 242 n.5 (1984) (citing statutes and cases).

C. Top-Down Urban Revitalization

The U.S. Supreme Court held that the condemnation of sound residential parcels for retransfer for private urban revitalization did not violate the Fifth Amendment's Public Use Clause in 2005 in *Kelo v. City of New London*.[223] *Kelo* generated an immense amount of negative reaction, and the "backlash probably resulted in more new state legislation than any other Supreme Court decision in history."[224] Without rehearsing the *Kelo* decision, which already has been the subject of vast scholarly commentary,[225] I will note that the case is an important lynchpin of state and local government efforts to create local analogues to national industrial policies.[226]

A pernicious effect of *Kelo*'s imprimatur upon condemnation for retransfer for economic development is the likely *reduction* in the efficiency of urban revitalization. This results from the fact that "projects will have to be made to 'work' in blighted areas that might be poorly suited for them."[227]

Although gigantic top-down projects might have their merits, they do not replace bottom up development. The new "CityCenter Las Vegas" project, with eighteen million square feet of hotels, condominiums, and shopping, is perhaps the largest such complex in the country.[228] But, "[i]t is not 'a community,' as [one of its developers] pretends—where will his condo dwellers go to buy groceries?"[229] "It will never, can never be a 'gathering place' for Las Vegans, since more and more of them live in gated neighborhoods in the suburbs."[230] The Center City project could not have been built without coercion because the land was acquired through a hotly contested condemnation.[231] Despite government

---

223. 545 U.S. 469, 482-83 (2005).

224. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2102 (2009).

225. *See, e.g.*, David L. Callies, Kelo v. City of New London*: Of Planning, Federalism, and a Switch in Time*, 28 U. HAW. L. REV. 327 (2006) (discussing the inversion whereby the liberal wing of the Supreme Court favored federalism in *Kelo* and the conservative wing favored application of the federal constitution); David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After* Kelo, 101 NW. U. L. REV. COLLOQUY 5, 5 (2006) (asserting that the post-*Kelo* reform movement's emphasis on preventing revitalization condemnation, as opposed to blight condemnation, "privileges the stability of middle-class households relative to the stability of poor households, and in so doing, expresses the view that the interests and needs of poor households are relatively unimportant").

226. *See* Steven J. Eagle, Kelo*, Directed Growth, and Municipal Industrial Policy*, 17 SUP. CT. ECON. REV. 63 (2009).

227. Lynn E. Blais, *Urban Revitalization in the Post-*Kelo *Era*, 34 FORDHAM URB. L.J. 657, 685 (2007).

228. See David Littlejohn, *If Not a City, Then What?*, WALL ST. J., Dec. 23, 2009, at D5 (describing project).

229. *Id.*

230. *Id.*

231. City of Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1, 11 (Nev.

assistance, the project's development has been troubled.[232]

The president of the Partnership for New York City, comprised of powerful business leaders,[233] recently asserted: "Without power to assemble sites to keep pace with demands of a modern economy, our cities would be doomed to decay. Prohibit condemnation of rural farms and greenfields, but allow cities to constantly renew themselves, or they will die."[234] The juxtaposition of the organic notion of cities renewing "themselves" with the top-down requirement of centralized condemnation apparently eluded the author.

1. The Idée Fixe: The Rise of the Creative Class.—One notable example of an enthusiasm that served as an impetus for urban redevelopment is the identification of what Professor Richard Florida grandly referred to as *The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community, and Everyday Life*.[235] Florida described this nascent socioeconomic group as "people who are paid principally to do creative work for a living . . . the scientists, engineers, artists, musicians, designers and knowledge-based professionals."[236] In an article discussing the movement towards "concentrated affluence" in inner-city neighborhoods,[237] Professor Audrey McFarlane stated that "the 'Creative Class' values urban space because they need face-to-face interactions for social fulfillment."[238] She cites members of the "creative class," together with "affluent adults without young children" and former suburbanites

---

2003) (adopting expansive views of "blight" and "public use").

232. *See, e.g.*, Alexandra Berzon, *Contract Dispute Could Hamper City Center Finances*, WALL ST. J., May 19, 2010, at B2 ("Contractor claims against City Center . . . could jeopardize the projects's loan contracts and condo sales, the project said in a recent court filing.").

233. Partnership for New York City, http://www.nycp.org/about.html (last visited May 17, 2010).

> The Partnership is a nonprofit membership organization comprised of a select group of two hundred CEOs ("Partners") from New York City's top corporate, investment and entrepreneurial firms. Partners are committed to working closely with government, labor and the nonprofit sector to enhance the economy and maintain New York City's position as the global center of commerce, culture and innovation.

Id.

234. Kathryn Wylde, *Minus Eminent Domain, Cities Die*, WALL ST. J., Nov. 16, 2009, at A22 (letter to the editor).

> Cities need every means at their disposal to attract private investment and encourage development. Without the ability to assemble sites that can be redeveloped, we will have brownfields where green buildings should rise, vacant manufacturing lofts where biotech labs are needed. When used well, eminent domain is a critical tool for keeping our economy growing.

235. RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY, AND EVERYDAY LIFE (2002).

236. *Id.* at xiii.

237. Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1 (2006).

238. *Id.* at 14 (citing FLORIDA, *supra* note 235, at 182-87).

whose children have grown, as "[a] broad class of people with ample financial resources, expensive tastes, and high demands for convenient, gourmet, and high-end services and products is creating an unprecedented pressure to restructure urban space to suit their needs and desires."[239]

> It is essential that government facilitate redevelopment, and often such development is accomplished through a public/private partnership. The most dramatic use of municipal power comes from the choice to use eminent domain in a particular redevelopment context, such as in a residential neighborhood. . . .
>
> Municipal power is also used to facilitate both private commercial and city-sponsored commercial redevelopment. The city plays a role in the residential context by actively supporting rehabilitation and renovation by middle class families—this is justified by attracting people with the resources to do something positive for the community. . . . [W]hether privately or publicly initiated, government plays an integral role in private development.[240]

Professor Richard Schragger, in a recent article describing "local political pathologies" associated with municipal "giveaways" to attract mobile capital and "exploitation" of existing mobile capital,[241] refers to municipal efforts to attract capital by "offering amenities that will appeal to the so-called 'creative class' or to wealthier incomers."[242]

Although those accounts suggest "the twenty-first century is witnessing a new upper-middle class urban American dream,"[243] that conclusion might be premature. In the most sought-after cities during the housing bubble, "pied-a-terres and speculative buyers increasingly have influenced the trajectory of urban housing markets."[244]

According to Professor Gideon Kanner,

> Perversely, urban redevelopment as practiced has contributed to urban decline by tearing down large numbers of badly needed urban low and moderate cost dwellings. What began as "slum clearance" in short order became a destroyer of urban "blight," a term so elastic as to earmark perfectly usable and badly needed low cost housing for destruction. . . . Redevelopment usually succeeds, if at all, in creating a few urban shopping malls or downtown office buildings that are populated by

---

239. *Id.* at 13.

240. *Id.* at 38-39 (footnotes omitted).

241. Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 507 (2009) (citing RICHARD FLORIDA, CITIES AND THE CREATIVE CLASS 27-45 (2005)).

242. *Id.* at 507 (footnote omitted).

243. McFarlane, *supra* note 237, at 14.

244. Joel Kotkin, *The Ersatz Urban Renaissance*, WALL ST. J., May 15, 2006, at A14.

> commuting suburbanites who wouldn't be caught dead living in the city. . . . In spite of a recent trickle of empty nesters and yuppies who tend to move into trendy areas of what one commentator has aptly called "hip cool cities," the trend continues—the net migration is still out of, not into cities, and so far redevelopment has not only failed to stem that outgoing population tide but has intensified it.[245]

"Instead of luring the 'hip and cool' with high-end amenities," Joel Kotkin admonished that cities must serve the needs of working- and middle-class families and businesses.[246] "These include such basic needs as public safety, maintenance of parks, improving public schools, cutting taxes, regulatory reform—in other words, all those decidedly unsexy things that contribute to maintaining a job base and the hope for upward mobility."[247]

Furthermore, Kotkin decried the "myth" of "superstar cities,"[248] observing that the triumphs of the recent financial boom "obscure the longer-term developments that continue to reshape metropolitan America. Economic and demographic trends suggest that the future of American urbanism lies not in the elite cities but in younger, more affordable and less self-regarding places."[249]

Recently, many officials of medium-sized cities who paid substantial lecture fees to glean Richard Florida's insights are feeling disabused by what one journalist who has written extensively about housing and development calls "the ruse of the creative class."[250]

2. The Rise of Showcase Projects.—Many scholars hypothesize that a driving force behind the showcase projects is the need for politicians to appear as if their actions are accomplishing something. Herbert Rubin studied the perceptions of development practitioners about showcase projects by surveying planners in cities with populations over 25,000.[251] Although the study was conducted in the late 1980s, population growth and newer quicker medium for public awareness likely only increase these findings, not diminish them. Rubin concluded that "[t]he survey material show that approximately half of the economic development practitioners are concerned that either their work is formalistic or that much of the urban economic development effort is guided by symbolic, rather than substantive, economic development concerns."[252] These

---

245. Gideon Kanner, *Do We Need to Impair or Strengthen Property Rights in Order to "Fulfill Their Unique Role"? A Response to Professor Dyal-Chand*, 31 U. HAW. L. REV. 423, 436-37 (2009) (footnotes omitted).

246. Kotkin, *supra* note 244.

247. *Id.*

248. Joel Kotkin, *The Myth of 'Superstar Cities,'* WALL ST. J., Feb. 13, 2007, at A25.

249. *Id.*

250. *See* Alec MacGillis, *The Ruse of the Creative Class*, AMER. PROSPECT, Dec. 21, 2009, at 12.

251. Herbert J. Rubin, *Symbolism and Economic Development Work: Perceptions of Urban Economic Development Practitioners*, 19 AM. REV. PUB. ADMIN. 233, 233-34 (1989).

252. *Id.* at 245.

empirical findings mirror the same results seen on the grander scale of international economic development.[253] Furthermore, federally funded urban redevelopment programs "encouraged big, ambitious projects," because cities seeking funding had to produce "convincing 'workable programs' demonstrating how they would excise blight from redevelopment project areas. Designed as civic symbols of area-wide rejuvenation, redevelopment projects often boasted a level of public amenity superior to what the private sector usually built, except in the very wealthiest areas."[254]

Because showcase projects are driven by symbolism, they should not be expected to be economically viable. "[W]hen government officials want an economic development project more than the private interests chosen to develop it do," one respected business commentator recently noted, "[p]rojects grow bigger and more ambitious than they need to be, thereby requiring more subsidies than they deserve, until virtually all of the economic benefits wind up in the hands of private interests."[255] Showcase projects exemplify the proclivity of governments to give away public resources to lure mobile capital, while correspondingly exploiting owners of fixed capital such as real estate.[256]

D. Government Support for Private Redevelopment

Government support for redevelopment includes the condemnation of multiple small parcels, which it subsequently assembles into large parcels that it transfers to redevelopers at little or no charge. Other forms of support include subsidized financing[257] and infrastructure.[258] The receipt of such opportunities is very valuable, so that developers aggressively seek both that redevelopment projects are created and that they are designated as redeveloper. This process is

---

253. William Easterly, *The Cartel of Good Intentions*, 131 FOREIGN POLICY 40, 44-45 (2002), *available at* 2002 WLNR 5330447.

254. George Lefcoe, *After* Kelo, *Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TUL. L. REV. 45, 86 (2008).

255. Steven Pearlstein, *Out of Control: The Sorry Saga of the Convention Center Hotel*, WASH. POST, Feb. 12, 2010, at A20 (noting that the agreement for an adjoining "headquarters" hotel sought by the Washington, D.C., Convention Center Authority would, inter alia, subordinate rents to other expenses, including the hotel operator's management fee).

256. Schragger, *supra* note 241, at 493.

257. *See, e.g.*, Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 790 (1996) ("Today, every state provides tax and other economic incentives as an inducement to local industrial location and expansion." (footnote omitted)); Alyson Tomme, Note, *Tax Increment Financing: Public Use or Private Abuse*, 90 MINN. L REV. 213 (2005).

258. *See, e.g.*, Lefcoe, *supra* note 254, at 86 ("Federally funded urban redevelopment encouraged improvements in civic infrastructure because local governments could count such expenditures to meet their matching share contribution under the federal renewal program.").

known as "secondary rent seeking."[259]

Aside from the direct or indirect provision of taxpayer funds,[260] the process is driven by government expropriation of assembly gains. Large tracts of land in, and adjacent, to downtown areas have a higher market value than the aggregate of smaller parcels comprising them. Pro rata shares of this value are inchoate in the ownership of each of the smaller parcels. If government had imposed unitization instead of condemnation, this value would have inured to the owners instead of the government and its redevelopment transferees.[261] Nevertheless, and despite concerns evinced by U.S. Supreme Court Justices,[262] expropriation of assembly gains has been the almost universal rule.[263]

The process of allocating all the assembly gains to the condemnor and subsequent redevelopers not only induces the secondary rent seeking by redevelopers,[264] but also mobilizes an extended legion of beneficiaries of the current system, such as feasibility consultants, lawyers, bankers, and construction unions to join in its protection. This tends to defeat the more efficient utilization of resources that was the raison d'être of revitalization in the beginning.

---

259. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 85-86 (1986) (referring to efforts by prospective redevelopers and other interest groups to promote appropriations of others' property for their subsequent gain); *see also* Gregory S. Alexander, *Eminent Domain and Secondary Rent-Seeking*, 1 N.Y.U. J. L. & LIBERTY 958 (2005).

260. By direct provision, I refer to infrastructure, targeted training for employees, and the like. Indirect subsidies include revenues forgone through the use of industrial revenue bonds and tax increment financing.

261. *See* Owen L. Anderson & Ernest E. Smith, *Exploratory Unitization Under the 2004 Model Oil and Gas Conservation Act: Leveling the Playing Field*, 24 J. LAND RESOURCES & ENVTL. L. 277, 285 (2004) (noting that most oil and gas producing states require unitization, by which producing fields are exploited as if they had unitary ownership, with net proceeds shared by various surface and mineral rights holders on a pro rata basis).

262. Transcript of Oral Argument, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), *available at* 2005 WL 529436. Justice Kennedy asked the petitioners' lawyer:

> Are there any writings or scholarship that indicates that when you have property being taken from one private person ultimately to go to another private person, that what we ought to do is to adjust the measure of compensation, so that the owner—the condemnee—can receive some sort of a premium for the development?

Id. at *15. He later observed to defendants' counsel: "It does seem ironic that 100 percent of the premium for the new development goes to the, goes to the developer and to the taxpayers and not to the property owner." *Id.* at *30. Justice Breyer asked the respondents' lawyer: "is there some way of assuring that the just compensation actually puts the person in the position he would be in if he didn't have to sell his house?" *Id.* at *32-33.

263. In the only case that the author has located on point, *Barancik v. County of Marin*, 872 F.2d 834, 837 (9th Cir. 1989), the court upheld a scheme of density requirements and limited growth on only a few parcels that awarded all residents in the affected area an aliquot share of development rights that could be traded and combined to enable development of parcels to which the rights were assigned.

264. *See* Merrill, *supra* note 260 and accompanying text.

Three recent New York cases seem to epitomize the unsatisfactory state of current redevelopment jurisprudence. Despite Justice Stevens' assurance in *Kelo* that courts would rectify eminent domain abuse,[265] and Justice Kennedy's assurance in his concurrence that courts would apply heightened scrutiny to situations lending themselves to pretextual condemnation,[266] these cases remind us that the process of preventing abuse is tenuous at best.

In *Goldstein v. New York State Urban Redevelopment Corp.*,[267] the New York Court of Appeals considered the constitutionality of the condemnation of lands in downtown Brooklyn for inclusion in "Atlantic Yards," a twenty-two-acre mixed-use development proposed by developer Bruce Ratner.[268] The U.S. Court of Appeals for the Second Circuit had previously rejected, citing *Kelo*, a federal claim asserting no public use.[269] The New York court, after describing the massive project,[270] conceded that the condition of the condemned parcels was not dire.[271] It added:

> Gradually, as the complexities of urban conditions became better understood, it has become clear that the areas eligible for such renewal are not limited to 'slums' as that term was formerly applied, and that, among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose.[272]

The dissenting opinion of Judge Smith, referring disparagingly to an earlier era of transformative property, noted that "blight removal or slum clearance, which were much in vogue among the urban planners of several decades ago, have waned in popularity," thus "vindicating" a 1962 dissenting judge's observation that "[t]he public theorists are not always correct."[273] Judge Smith

---

265. *Kelo*, 545 U.S. at 487 (noting that courts could deal with abuses "if and when they arise").

266. *Id.* at 493 (Kennedy, J., concurring) (asserting that "a more stringent standard of review . . . might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted").

267. 921 N.E.2d 164 (N.Y. 2009).

268. *Id.* at 165-66.

269. Goldstein v. Pataki, 516 F.3d 50, 59-60 (2d Cir.), *cert. denied*, 128 S. Ct. 2964 (2008).

270. 921 N.E.2d at 166. The court described the project as including, in an initial phase, the construction of an arena to house the National Basketball Association's Nets franchise, currently the New Jersey Nets, and transportation modernization projects. *Id.* In a second phase, sixteen high-rise towers would be constructed to serve both commercial and residential purposes. *Id.* Between 5325 and 6430 dwelling units would be included, and more than a third would affordable either for low and/or middle-income families. *Id.* There also would be approximately eight acres of publicly accessible landscaped open space. *Id.*

271. *Id.* at 171.

272. *Id.* at 172 (citations omitted).

273. *Id.* at 189 (Smith, J., dissenting) (quoting Cannata v. City of New York, 182 N.E.2d 395, 399 (N.Y. 1962) (Van Voorhis, J., dissenting)).

also observed that the southern part of the large tract, where the plaintiffs lived, appeared to be a "normal and pleasant residential community,"[274] that "blight" was alleged only late in the game, and that "[i]n light of the special status accorded to blight in the New York law of eminent domain, the inference that it was a pretext, not the true motive for this development, seems compelling."[275]

In juxtaposition to *Goldstein*, a subsequent New York intermediate appellate court ruled that a revitalization project in Manhattan actually was for private benefit and was compelling. In *Kaur v. New York State Urban Development Corp.*,[276] the court concluded that an urban redevelopment project for which extensive condemnation was employed was for the benefit of Columbia University, a private institution, and did not meet the requirements for "public use" under the United States and New York constitutions. Furthermore, the project was not a "civil project" as required by New York redevelopment law.[277]

However, massive redevelopment projects inevitably provide at least some public benefit. Thus, *The New York Times* editorially denounced the appellate decision in *Kaur*.[278] Perhaps not coincidently, land for the *Times*' new headquarters building was acquired through similar condemnation and in partnership with Bruce Ratner, the Atlantic Yards developer.[279]

Finally, in *Didden v. Village of Port Chester*,[280] a private redeveloper that had been clothed with the village's power of condemnation, exercised that power in apparent retaliation for the condemnee's refusal to take the redeveloper into a business partnership.[281] The court held that, even if the plaintiff's action had not been time-barred, it could not prevail on the merits because *Kelo* had

---

274. *Id.* at 190.

275. *Id.* at 189.

276. 892 N.Y.S.2d 8, 25(App. Div. 2009) (holding appropriation for expansion of Columbia University campus an unconstitutional taking, and the Urban Development Corporation Act unconstitutionally vague and violative of due process).

277. *Id.* at 15-16, 23 (citing U.S. CONST. amend. V; N.Y. CONST. art. I § 7, UNCONSOL. LAWS § 6253(6)(d) (UDCA 3(6)(d))).

278. Editorial, *Eminent Domain in New York*, N.Y. TIMES, Dec. 14, 2009, at A30.

279. *See* Matt Welch, *Why The New York Times Loves Eminent Domain*, REASON, Oct. 2005, *available at* http://reason.com/archives/2005/10/01/why-the-new-york-times-s-emine. The article noted that

> 55 businesses—including a trade school, a student housing unit, a Donna Karan outlet, and several mom-and-pop stores [were evicted through condemnation], under the legal cover of erasing "blight," in order to clear ground for a 52-story skyscraper. The *Times* and Ratner, who never bothered making an offer to the property owners, bought the Port Authority's adjacent property at a steep discount ($85 million) from a state agency that seized the 11 buildings on it; should legal settlements with the original tenants exceed that amount, taxpayers will have to make up the difference.

Id.

280. 173 F. App'x 931 (2d Cir. 2006).

281. *Id.* at 932-33.

precluded second-guessing which land should be condemned.[282] *Didden* is especially troubling, because although assembly gains could be exacted only from actual condemnees, premiums that owners place on their property above market value could be exacted from many owners in the redevelopment district as the price for avoiding condemnation.

As I have elaborated upon elsewhere, it is bootless to try to determine if the public benefit of a revitalization transfer is "primary" or "incidental,"[283] even though that standard is reiterated in *Kelo*.[284] So long as officials act for public motives and attempt in good faith to maximize benefits for the polity, whether the corresponding private gain is more or less than the pubic gain seems irrelevant for takings analysis. The "primary" vs. "incidental" benefit distinction is either a heuristic to discourage bribery or an analysis of proportionality that ought to be addressed by courts directly in terms of substantive due process rather than within the rubric of the "public use" aspect of the Takings Clause.[285]

The difficulty in establishing the size and distribution of gains and losses from revitalization leads to a broader insight about the hubris in efforts to transform the nature of property. Individuals value property in land because property interests are associated with natural resources and amenities. Increasingly, the most important amenity is propinquity to others with whom one might forge valuable business or social connections.

The theory of local expenditures, developed by Charles Tiebout, suggests that individual homeowners will gravitate towards those municipalities that provide them with optimal combinations of amenities and taxes.[286] Although the Tieboutian model stressed the relationship between individuals and polities, "in an agglomerative model, people and businesses move to get the benefit of being near neighbors who provide them with social, consumption and employment options or informational spillovers."[287]

The Tieboutian model suggests that the possibility of exit serves to constrain municipal overreaching, so that stringent state controls on local taxing power are unnecessary.[288] On the other hand, the fact that holders of mobile capital[289] may have a tenable "exit" alternative to "voice"[290] may ameliorate, but by no means

---

282. *Id.* at 933. (quoting Kelo v. City of New London, 545 U.S. 469, 488-89 (2005)).

283. Eagle, *supra* note 226, at 103-07.

284. Kelo v. City of New London, 545 U.S. 469, 490-91 (2005) (Kennedy, J., concurring).

285. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 542-43 (2005) (repudiating due process as an element of takings analysis, but affirming it as "an inquiry . . . logically prior to and distinct from the question whether a regulation effects a taking"). *See generally* Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899.

286. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

287. David Schleicher, *The City as a Law and Economic Subject*, U. ILL. L. REV. (forthcoming), *available at* http://ssrn.com/abstract=1471555.

288. *See generally* Clayton P. Gillette, *Fiscal Home Rule*, 86 DENV. U. L. REV. 1241 (2009).

289. *See* Schragger, *supra* note 241.

290. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

cure, the problem of government expropriation of quasi-rents, the returns that flow from sunk costs. For instance, although highly paid professionals might live in outlying areas, they might nevertheless feel compelled to work in the expensive heart of leading cities so as to be with people like themselves. Once they have invested time and money in establishing their agglomerative networks, individual members are susceptible to being locked into paying high local taxes to pay for services that benefit others. Those whose presence add value to networks desire to internalize the positive externalities that otherwise would be generated by their membership. This provides the relative attractiveness of joining exclusive clubs that are owned by the members rather than by external proprietors,[291] as well as explaining the economic advantage of the shopping center, which permits highly successful merchants to capitalize on the increased traffic they bring to their neighbors in the form of paying lower rents.[292]

E. Gauging the Success of Revitalization

Revitalization efforts tend to be wasteful. For instance, "the proliferation of tax incentives has not produced the intended effect of expanding economic activity and employment in the competitor states."[293] Given that much of the cost is borne by taxpayers and by those who would receive municipal services were the tax revenues to provide them not diverted to debt service on tax increment financing bonds, there is little incentive to ensure that redevelopment is cost-effective.

In *Kelo* itself, the genesis of the condemnation of residential parcels was the expectation of synergy between planned hotel, commercial, and recreational uses in the revitalized area and the recently constructed, and adjoining, Pfizer Inc. world pharmaceutical research center.[294] Despite all of the comprehensive studies that were heavily relied upon by the state and federal supreme courts,[295] the revitalization project never got off the ground. Furthermore, Pfizer announced in November 2009 that it would leave New London.[296] The decision to leave "stirred up resentment and bitterness among some local residents. They see Pfizer as a corporate carpetbagger that took public money, in the form of big tax breaks, and now wants to run."[297]

---

291. *See generally* James M. Buchanan, *An Economic Theory of Clubs*, 32 ECONOMICA 1 (1965).

292. B. Peter Pashigian & Eric D. Gould, *Internalizing Externalities: The Pricing of Space in Shopping Malls*, 41 J.L. & ECON. 115, 118-19 (1998); *see also* Eagle, *supra* note 226 (discussing additional examples).

293. Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 397 (1996).

294. Kelo v. City of New London, 545 U.S. 469, 473-75 (2005).

295. *Id.* at 483-84.

296. Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Suit*, N.Y. TIMES, Nov. 13, 2009, at A1.

297. *Id.*

Another apparently unsuccessful large-scale redevelopment project raises additional legal issues. In *Kaufmann's Carousel, Inc. v. City of Syracuse Industrial Development Agency*,[298] tenants at the Carousel mall challenged a plan under which it would be integrated with an adjoining retail complex into a shopping center/tourist destination known as DestiNY USA, which was "purported to be one of the largest economic development projects in the history of the State of New York."[299] The plaintiffs focused on attempts to condemn narrow slivers of their intangible rights, such as easements of way, instead of their entire leasehold interests.[300] The court rejected these arguments on the grounds that state eminent domain law permitted the condemnation of fractional property rights selected by the condemnor.[301] The city's position was a marked departure from the usual practice of localities of sheltering under the Supreme Court's "parcel as a whole" rule as the proper baseline for takings analysis.[302]

Kaufmann also illustrates that Professor Margaret Jane Radin's notion of "conceptual severance"[303] does not measure departures from a reliable baseline, because government entities chose broad or narrow definitions of relevant property rights, to suit their needs in litigation.[304] Thus, what I term "conceptual agglomeration," and not "parcel as a whole," is at the other end of the continuum.[305]

Furthermore, some *Kaufmann* plaintiffs claimed that their store leases, which they acquired as a result of previous condemnations for urban revitalization, thus were demonstrably in the public interest such that the subsequent condemnation actions against them could not have been for a public use.[306] The court ruled against them on the ground that "'land devoted to a public use may be

---

298. 750 N.Y.S.2d 212 (N.Y. App. Div. 2002).

299. *Id.* at 215.

300. *Id.*

301. *Id.* at 218.

302. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 326-27 (reiterating that "*Penn Central* . . . [made] it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on 'the parcel as whole'" (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978)).

303. *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988) (describing regulatory takings plaintiffs who attempt to define a very small quantum of property affected by a government regulation, so as to maximize the resulting percentage of diminution in value).

304. Perhaps the most extravagant such claim was the New York Court of Appeals' assertion that the relevant parcel in *Penn Central* was all of the land that the railroad owned along Park Avenue in Manhattan, in addition to Grand Central Terminal at the foot of its holdings. Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1276-77 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978). The Supreme Court later characterized the New York court's relevant parcel analysis in *Penn Central* as "extreme—and, we think, unsupportable—view of the relevant calculus." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

305. *See* STEVEN J. EAGLE, REGULATORY TAKINGS § 7-7 (4th ed. 2009).

306. *Kaufmann*, 750 N.Y.S.2d at 221.

condemned for another public use only if the new use would not materially interfere with the initial use' and here the initial public purpose for the property would be furthered."[307] This statement might be read as dicta suggesting that, if the new use obliterated the existing public use in order to achieve a different public benefit deemed more important, the second condemnation would be impermissible.

Although the court in *Kaufmann* rejected the explicit argument that land condemned a first time for retransfer to private interests is immune from retransfer a second time, its cautious response points to the fact that revitalization redevelopers might achieve a preferred legal status, quite beyond subsidized financing, the transfer of assembly value, and the donation of infrastructure. In this respect, the plaintiffs are asking for a transformation in property rights that has been proposed in other contexts in the form of regulatory dualism. Under this construct, apparently similar property interests could be subject to different legal regimes in order to provide ex ante assurances to investors in preferred industries or activities.[308]

Apparently the DestiNY USA project has not been successful,[309] and, eight years after the New York appellate decision, a current review of DestiNY USA's own web site shows no activity beyond planning.[310]

Most recently, *The New York Times* reported that sports stadia have fallen out of favor as showcase revitalization projects: "[T]he stadiums were sold as a key to redevelopment and as the only way to retain sports franchises. But the deals that were used to persuade taxpayers to finance their construction have in many cases backfired, the result of overly optimistic revenue assumptions and the recession."[311] After noting the back-loaded costs and sweeteners included to induce approval, the article noted that "[i]n many cases, the architects of the

---

307. *Id.* at 221 (alterations omitted) (quoting *In re* Village of Middleburgh, 502 N.Y.S.2d 109, 109-10 (App. Div. 1986).

308. *See* Ronald J. Gilson et al., *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the U.S., and the EU* (Mar. 1, 2010), *available at* http://ssrn.com/abstract=1541226. In regulatory dualism, one of the two systems of regulation—the established regime—is relatively lax and is maintained to accommodate established firms. The second system—the reformist regime—is more rigorous, and is available to existing or new firms that desire to make themselves more credible with the class of patrons whose interests the regulation is designed to protect. *Id.* at 6.

309. *See* Rick Moriaty, *Bank Says Destiny USA a "Failure"; Developer Says It's Not*, POST STANDARD (Syracuse, New York), June 16, 2009, *available at* http://www.syracuse.com/news/index.ssf/2009/06/bank_says_destiny_usa_a_failur.html. The article stated that Leslie Fagan, a Citigroup attorney, at a recent hearing "called Destiny USA a 'failure' with no tenants and urged a judge not to order the bank to lend the project more money." *Id.* Fagan also told a state supreme court judge that "[d]espite spending millions of dollars on marketing, the project has no tenants—and no hope of getting them if there is no money to build out store space." *Id.*

310. *See* Destiny USA, http://www.destinyusa.com/index.php (last visited May 20, 2010).

311. Ken Belson, *As Revenue Plunges, Stadium Boom Deepens Municipal Woes*, N.Y. TIMES, Dec. 25, 2009, at B8.

deals are long gone by the time the bill comes due."[312]

F. "New Regionalism" and "New Governance"

Real property in the United States generally is subject to plenary regulation by the States, delegation to local governments that might be substantial, particularly with respect to land use, and oversight by the federal government respecting some matters of national interest, such as interstate commerce and the protection of certain individual rights. Some theorists seeking the more efficient and comprehensive provision of services or the elimination of pernicious effects of localism have are dissatisfied with this model. (Of course, many residents revel in localism, and oppose subsidizing comprehensives services for others.) Two suggestions directed towards circumventing the rigidity of formal governance structures are discussed here.[313]

Professor Sheryll Cashin argued that the fragmentation of metropolitan areas into numerous polities created a "dynamic of oppression," whereby majorities in affluent suburbs "marginalized groups" that lived outside their boundaries and generally exercised a "tyranny of the favored quarter."[314] These are the "high-growth, developing suburbs that typically represent about a quarter of the entire regional population but that also tend to capture the largest share of the region's public infrastructure investments and job growth."[315] In describing the challenges to new regionalism, the author writes that:

> The fiscal and social access disparities that flow from fragmented metropolitan governance are at the core of the regionalist challenge. Metropolitan movements of earlier decades sought to stem this growing inequity by creating metropolitan-wide governments. But this effort met with dramatic failure primarily because it was completely antithetical to the desire of suburban voters for local autonomy. The "New Regionalist" agenda accepts the political futility of seeking consolidated regional government. Instead, it attempts to bridge metropolitan social and fiscal inequities with regional *governance* structures, or fora for robust regional cooperation, that do not completely supplant local

---

312. *Id.*

313. For similar formulations, see Hari M. Osofsky, *Is Climate Change "International"? Litigation's Diagonal Regulatory Role*, 49 VA. J. INT'L L. 585, 591 (2009) (discussing "diagonal regulation," defined as regulation that "cuts across both vertical (multiple levels of government) and horizontal (branches of government or other entities functioning at the same level) divisions of governance.") and Hari M. Osofsky, *The Future of Environmental Law and Complexities of Scale: Federalism Experiments with the Climate Change Under the Clean Air Act*, WASH. U. J.L. & POL'Y (forthcoming 2010), *available at* http://ssrn.com/abstract=1529668 (stressing need for diagonal regulation to ensure clean air).

314. Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1987 (2000).

315. *Id.*

governments.[316]

Professor Laurie Reynolds, after reviewing devices that are used for regional cooperation, concluded that wealthier suburbs would have the upper hand in bargaining, and that, "because the New Regionalism's primary goal is to correct the socio-economic disparities in metropolitan regions, the voluntary intergovernmental cooperation approach to regionalism is likely to leave untouched the root sources of the very disparity it seeks to remedy."[317]

Localism has been defended on the disparate grounds that it encourages democratic participation in local government,[318] and that it is an efficient way to provide services.[319] The efficiency argument largely builds upon Tiebout's *A Pure Theory of Local Expenditures*,[320] which stated that homogeneous suburbs would compete for residents by offering various packages of local public goods and associated taxation.[321]

Professor Aaron Saiger attacked "Tiboutian localism," in *Local Government Without Tiebout*,[322] where he asserted that residents sort themselves into one polity or another based not only on tastes, but also on wealth.[323] By controlling entry into their communities, Saiger argued, existing residents will "ratchet" up the wealth levels of new residents, thus sorting people by wealth and also by race.[324] He proposed structural reform that "preserves localism but undermines Tiebout."[325] Analogizing to electoral reform to enhance equity, he suggests that, just as electoral boundaries are fluid from one redistricting to the next, so should local government borders be geographically fluid.[326]

As developed by Orly Lobel[327] and Bradley Karkkainen,[328] "New Governance"[329] is an attempt to reorient away from the "command-style

---

316. *Id.* at 2027 (citing JOHN J. HARRIGAN, POLITICAL CHANGE IN THE METROPOLIS 342-65 (1993) (describing the "movement for metropolitan-wide government from 1950s to 1970s and analyzing its marked lack of success") (citation omitted)).

317. Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 155-56 (2003).

318. *See, e.g.*, Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 29 (1998).

319. *See, e.g.*, Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 194 (2001).

320. Tiebout, *supra* note 286.

321. *Id.* at 418.

322. Aaron J. Saiger, *Local Government Without Tiebout*, 41 URB. LAW. 93 (2009).

323. *Id.* at 104-05.

324. *Id.* at 107-08.

325. *Id.* at 120.

326. *Id.* at 124-25.

327. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

328. Bradley C. Karkkainen, *"New Governance" in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004).

329. *See id.* at 471 n.2 (noting that Karkkainen borrowed the term "new governance" and

regulatory model" culminating in the New Deal and Great Society.[330]

> In contrast, the New Governance model (at least according to its proponents) breaks with fixity, state-centrism, hierarchy, excessive reliance on bureaucratic expertise, and intrusive prescription. It aspires instead to be more open-textured, participatory, bottom-up, consensus-oriented, contextual, flexible, integrative, and pragmatic. On some variants, it also aspires to be adaptive, claiming both the capacity and the necessity to continuously generate new learning and to adjust in response to new information and changing conditions, systematically employing information feedback loops, benchmarking, rolling standards of best practice, and principles of continuous improvement.[331]

Professor Lobel asserted that some scholars are breaking away from "the false dilemma between centralized regulation and deregulatory devolution," and claimed "a growing consensus in legal scholarship that innovative approaches to law, lawmaking, and lawyering are possible and necessary."[332] Lobel focused on the autopoietic theory of Gunther Teubner,[333] who "argues that the complexity of modern life and society requires a new, next-stage approach to regulation, that of reflexive law, in which law facilitates the internal discourse and coordination of other systems."[334]

Professor Karkkainen disclaims any singular foundation for New Governance scholarship, referring to it instead as "a loosely related family of alternative approaches to governance, each advanced as a corrective to the perceived pathologies of conventional forms of regulation."[335]

IV. THE NEW HOME OWNERSHIP

A. Homeownership as a Property Right

The reawakened notion that one finds rights in status and not in contract has found new expression in the assertion that status itself is a property right. Just as Charles Reich would have turned so-called regulatory property into conventional property,[336] the dignitary interest that inures in homeownership is asserted to augur in favor of public subsidies and other support for democratizing that status.[337] In this sense, the notion that everyone has a claim to the dignitary status

---

citing to scholarship employing it).

330. *Id.* at 473-74.

331. *Id.* at 474.

332. Lobel, *supra* note 327, at 343.

333. *See* Gunther Teubner, *Introduction* to AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 1, 1 (Gunther Teubner ed., 1987).

334. Lobel, *supra* note 327, at 362.

335. Karkkainen, *supra* note 328, at 496.

336. *See supra* notes 67-69 and accompanying text.

337. *See* Eduardo M. Peñalver, *Property Metaphors and* Kelo v. New London*: Two Views*

of homeowner resembles the universal entitlement to be called by an honorific in judicial proceedings.[338]

However, just as individuals are not necessarily benefitted by the bestowal of honorific titles,[339] attaining the status of homeownership often has proven disastrous to those without sufficient equity and income to ride out hard times and the exigencies that befall homeowners.[340] Although highly valued, homeownership in America "does not always deliver the benefits it promises, particularly for lower income homeowners."[341]

The independence that individuals derive from property ownership makes it a traditional desideratum for conservatives.[342] Those with a more progressive orientation value that homeownership carries with it a financial stake in the community's success, resulting in homeowners' greater civic participation.[343] Although homeownership thus generally is seen as desirable,[344] the financial instability that results from aggressive attempts to encourage homeownership, especially for those with low- and moderate-incomes, raises the issue of whether

---

of the Castle, 74 FORDHAM L. REV. 2971, 2973 (2006) (contrasting with the notion of the castle as a bulwark against third parties the view that it is "about the inherent dignity of homeownership . . . [and] the subjective importance and status that our society attaches to homeownership").

338. *See* Hamilton v. Alabama, 376 U.S. 650 (1964) (reversing the contempt conviction of an African-American woman who refused to answer the prosecutor's questions at a trial when addressed as "Mary" instead of "Miss Hamilton," while white witnesses were addressed by honorific titles and surnames).

339. *See, e.g.*, Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662 (1986). The author notes the advice in the classic interrogation manual that "the interrogator should use the suspect's last name, preceded by Mr., Mrs., or Miss, particularly if the suspect has a low economic status." *Id.* at 668 (citing FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 38-39 (3d ed. 1986)). The interrogation manual reasons that "[b]y thus flattering the person and providing him a sense of dignity from such unaccustomed courtesy, 'the interrogator will enhance the effectiveness of whatever he says or does thereafter.'" *Id.* (quoting INBAU ET AL., *supra*, at 39).

340. *See* discussion *infra* Part IV.D.

341. Kristen David Adams, *Homeownership: American Dream or Illusion of Empowerment?*, 60 S.C. L. REV. 573, 576 (2009).

342. Southern Agrarians especially stressed individual property ownership as necessary to a culture of family self-reliance. *See, e.g.*, M.E. BRADFORD, REMEMBERING WHO WE ARE: OBSERVATIONS OF A SOUTHERN CONSERVATIVE 86-87 (1985).

343. *See* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 12 (2001) (noting that "[e]ven after controlling for other economic and demographic differences between homeowners and renters, [studies have] found that homeowners were more conscientious citizens and were more effective in providing community amenities").

344. *But see* Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1098-99 (2009) (asserting that "the sanctity bestowed by American property law on one category of private property, residential real estate, is not warranted based on the psychological and sociological evidence").

expanding ownership is a worthwhile goal. The present crisis in residential real estate makes this point more evident.[345]

Even apart from personal and national financial considerations, the drive to transform neighborhoods often has redounded to the detriment of existing residents and close-knit communities. The demolition of the Southwest Washington, D.C. neighborhood that was the subject of the leading public use case *Berman v. Parker*[346] is illustrative. According to a local historian:

> Successive streams of migrants—increasingly poor working-class blacks, immigrants and native-born whites—would find community as they made the adjustment to urban life and attempted to gain a foothold. . . . Where residents found community, civic and charity leaders saw deterioration. . . . For the people who lived there, Southwest was a vital neighborhood community supported by a stable core of long-term residents, convenient shopping and established religious institutions.[347]

The Great Society-era observation that "urban renewal" means "Negro removal" was a perception still keenly felt at the time of *Kelo v. City of New London*.[348] More generally, neighborhoods that upper-middle class reformers might see as rundown are not therefore in need of replacement. Some recognize neighborhoods labeled as "slums" as socially valuable:

> [N]eighborhoods branded as slums may well have been better in important ways than their subsidized successors. Indeed, there are grounds to see [the late nineteenth and early twentieth centuries] as a time when the private sector produced not only a relatively large amount of "affordable" housing, but did so in forms that encouraged a social cohesion painfully lacking in government-built substitutes.[349]

The same author also asserts:

---

345. *See infra* Part IV.D.

346. 348 U.S. 26, 34-36 (1954) (upholding condemnation of sound buildings for renewal of blighted urban neighborhoods).

347. Linda Wheeler, *Broken Ground, Broken Hearts; In '50s, Many Lost SW Homes to Urban Renewal*, WASH. POST, June 21, 1999, at A1 (quoting Carol Kolker).

348. 545 U.S. 469, 522 (2005) (Thomas, J., dissenting). "Urban renewal projects have long been associated with the displacement of blacks; '[i]n cities across the country, urban renewal came to be known as "Negro removal."'" *Id.* (quoting Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 47 (2003)). The NAACP filed an amicus brief supporting Mrs. Kelo. Brief for NAACP et al. as Amici Curiae Supporting Petitioners, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108). For a fuller account of opposition to condemnation for urban revitalization by African-American leaders in the context of *Kelo*, see Andrew P. Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to* Kelo, 17 SUP. CT. ECON. REV. 237, 268-70 (2009).

349. Howard Husock, *Lessons from Housing's Not-So-Bad Old Days*, WALL ST. J., Sept. 23, 1991, at A14.

> Logic tells us that such housing serves important social purposes, including crime control. Vigilant owners concerned about the upkeep of their property are loath to rent to criminals and vandals—or those who don't watch their young children closely. Those who seek housing are thus sent a message that they must conform to social standards. At the same time, owner-occupied housing offers a means for those of low-income to climb on to the ladder of housing opportunity, using the income from rental units as a means of saving for a move up toward a higher-income, single-family neighborhood.
>
> Public housing stood this social structure on its head. Public management meant that no one with a financial stake in maintenance lived on the premises. Public ownership made it difficult to turn away, or to evict, tenants engaging in criminal activity. Equally important, subsidized rental projects provided no means for the poor to own—and ultimately to trade up. Thus was the social structure of striving, saving and being careful about to whom to rent undermined.[350]

B. The Visionary Approach to Publicly-Assisted Housing

In writing about the "entropy" of property, Professor Parisi noted that "[t]he initial seemingly attractive choice turns out to be suboptimal in the end."[351] In our quest to provide better housing for low- and moderate-income individuals and families, some social measures seemed to have worked well, and others not.

The agitation by the Progressive reformer Jacob Riis for reform of the squalid, poorly ventilated, and tuberculosis-ridden "old law" tenements was a success.[352] Regulation eliminating unhealthy and physically dangerous housing seems squarely in line with government's police power. As Professor Wendell Pritchett observed, because the early twentieth century reforms worked so well, an obsession with "blight" was used extensively during the second half of the past century as a scare tactic justifying urban revitalization. Specifically, he noted:

> To secure political and judicial approval for their efforts, renewal advocates created a new language of urban decline: a discourse of blight. Blight, renewal proponents argued, was a disease that threatened to turn healthy areas into slums. A vague, amorphous term, blight was a rhetorical device that enabled renewal advocates to reorganize property ownership by declaring certain real estate dangerous to the future of the city.[353]

---

350. Howard Husock, *The Folly of Public Housing*, WALL ST. J., Sept. 28, 1993, at A18.

351. Parisi, *supra* note 149, at 613. It might be that the mandatory agglomeration of land rights to prevent "entropy" that Professor Parisi advocates itself might turn out to be one of those "suboptimal" choices.

352. *See* JACOB J. RIIS, HOW THE OTHER HALF LIVES (Hill and Wang 1957) (1890).

353. Pritchett, *supra* note 348, at 3.

I have argued elsewhere that nuisance abatement, not condemnation, is the logical and more effective response to dangerous and unhealthy conditions.[354]

In addition to advocating and designing public and public-assisted housing to alleviate physical blight, advocates of reform designed public housing to alleviate psychological blight. Noted architects such as Le Corbusier believed that grand redevelopment would be uplifting; in effect, such "emphasis on monumentality encouraged the wholesale razing of older and poorer urban areas and implementation of large urban renewal projects."[355] Unfortunately, the effects of these large scale urban renewal projects were anything but uplifting:

> The buildings were unadorned, eleven-story concrete slabs with skip-stop elevators, long communal hallways, outside galleries, and large tracts of open green space. The design underscored the isolation of the project from the surrounding community by separating the new superblock from the existing street grid and creating large public common areas and open spaces that belonged to no one, thereby fostering a no man's land for criminal activity. The deterioration of the project began soon after its completion and was greatly accelerated by vandalism and violent crime committed by the gangs that quickly took control of the common areas and public spaces.[356]

Perhaps the most poignant reminder of the failure of massive and poorly-designed public housing projects was the demolition of the Pruitt-Igoe project in St. Louis.[357] Professor Reza Dibadj noted that its "pathetic destruction has become the symbol of a transition away from the ahistorical modern meta-narrative that the project has come to symbolize."[358] "The idea that 'clean lines, purity and simplicity of form would play a social and morally improving role in [our] society,'"[359] she added, "became viewed as . . . 'the modern machine for living, as Le Corbusier had called it with the technological euphoria so typical of the 1920s, had become unlivable, the modernist experiment, so it seemed, obsolete.'"[360]

---

354. Eagle, *supra* note 210, at 619-20.

355. Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 777-78 (1993).

356. Harry J. Wexler, *HOPE IV: Market Means/Public Ends—The Goals, Strategies, and Midterm Lessons of HUD's Urban Revitalization Demonstration Program*, 10 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 195, 206 (2001).

357. *See* EUGENE J. MEEHAN, THE QUALITY OF FEDERAL POLICYMAKING: PROGRAMMED FAILURE IN PUBLIC HOUSING 68-87 (1979) (discussing Pruitt-Igoe and the St. Louis Housing Authority).

358. Reza Dibadj, *Postmodernism, Representation, Law*, 29 U. HAW. L. REV. 377, 393 (2007).

359. *Id.* (quoting TIM WOODS, BEGINNING POSTMODERNISM 93 (1999)).

360. *Id.* (quoting ANDREAS HUYSSEN, AFTER THE GREAT DIVIDE 186 (1986)).

C. Affordable Housing

The definition of "affordable housing" necessarily is subjective, but the U.S. Department of Housing and Urban Development deems it to be housing that the household can obtain at a cost no higher than thirty percent of a family's annual income.[361] Initiatives to promote affordable housing seek to alter the market for housing, and historically have focused heavily on subsidization and government spending.[362] However, as federal spending programs have declined over time,[363] local levels of government have sought to fill some of the void through increased focus on regulation.[364] Ironically, however, many government policies, such as the imposition of urban growth boundaries, have the effect of making housing less affordable through making the construction of new housing more difficult.[365]

Although federal support for housing is often tied to broader economic interests,[366] concerns about the provision of affordable housing certainly helped to shield private entities from the stricter scrutiny, which may have in fact mitigated the damage caused by the 2007 sub-prime mortgage crisis.

D. The Current Housing Crisis

According to the well-known housing economist Karl Case, at the end of 2009 the United States faced an "economic disaster of major proportions," which was the "direct and indirect result of extreme volatility in the value of residential property that had served as collateral for the nation's huge stock of home mortgages."[367] This was a result of an "expansionary monetary policy . . . [that] reduced the cost of buying a home by almost a third."[368] Also, "[f]or most

---

361. HUD, Affordable Housing, http://www.hud.gov/offices/cpd/affordablehousing/ (last visited May 20, 2010).

362. KENT W. COLTON, HOUSING IN THE TWENTY-FIRST CENTURY: ACHIEVING COMMON GROUND 212-44 (2003); Esther Yang, *Affordable Housing in the US: A Brief History and Summation of 20th-21st Century Practices and Policies*, *available at* http://www.uark.edu/ua/kdhsmith/Affordable%20Housing%20in%20the%20US-%20history&summation.pdf.

363. *See* DOUGLAS RICE & BARBARA SARD, CTR. ON BUDGET & POLICY PRIORITIES, DECADE OF NEGLECT HAS WEAKENED FEDERAL LOW-INCOME HOUSING PROGRAMS: NEW RESOURCES REQUIRED TO MEET GROWING NEEDS 2-3 (2009), *available at* http://www.cbpp.org/files/2-24-09hous.pdf (noting that spending on federal low-income housing programs has fallen substantially).

364. RACHELLE ALTERMAN, EVALUATING LINKAGE, AND BEYOND: THE NEW METHOD FOR SUPPLY OF AFFORDABLE HOUSING AND ITS IMPACTS 1 (1989).

365. *See* William A. Fischel, *Comment on Anthony Downs's "Have Housing Prices Risen Faster in Portland Than Elsewhere?,"* 13 HOUSING POL'Y DEBATE 43, 44 (2002) (concluding that urban growth boundaries have raised the cost of housing in Portland, Oregon).

366. Michael S. Carliner, *Development of Federal Homeownership "Policy,"* 9 HOUSING POL'Y DEBATE 299, 304-05 (1998) (noting that many federal programs related to housing finance were originally started as to support the lending and building industries).

367. Karl E. Case, *Housing, Land, and the Economic Crisis*, LAND LINES, Jan. 2010, at 8. Case, together with Robert Shiller, invented the S&P/Case-Shiller repeat sales home price indexes.

368. *Id.* at 10.

households, the largest and most heavily debt financed purchase they will ever make is to buy a home, so housing demand in particular is rate sensitive and responded strongly to the monetary stimulus. With plentiful and cheap liquidity . . . a steady increase in house prices was the result."[369]

> One additional factor clearly played a role in all of this: the federal government's strong efforts to promote home ownership for rich and poor alike. In 1977 Congress passed the Community Reinvestment Act (CRA) and the Home Mortgage Disclosure Act (HMDA), designed to increase bank lending to low-income and minority households. Even today, banks have a CRA exam every year to determine whether they are meeting the credit needs of their entire CRA area, which in almost all cases includes low-income neighborhoods that in previous years might have been rejected ("redlined") for loans or insurance.
>
> These programs reflect a belief that the nation has an interest in promoting home ownership as the American Dream, which is thought by many to lead to meritorious behavior. A homeowner is considered likely to be a better citizen, and more involved in local affairs. Home ownership was also thought to be a way of building wealth for low-income households, part of the social safety net.[370]

The growth in size and complexity of the mortgage market largely results from the activities of two huge government-sponsored entities (GSEs), Fannie Mae and Freddie Mac. Together, they own or guarantee over $5.2 trillion in mortgages, which constitutes over forty percent of residential mortgages in the United States.[371] These GSEs purchased great numbers of mortgages from issuers, bundled them into blocks with uniform characteristics, and sold securities collateralized by these blocks in the international finance market in many tranches, each having different calculated characteristics of return and risk. However, these risk calculations were based on borrower behavior in times of normal real estate markets and a stable economy. Fannie and Freddie are "creatures of regulatory privilege," are likely to require a taxpayer bailout "measured in the hundreds of billions of dollars," and have used their "hybrid public/private structure to obtain and protect economic rents at the expense of homeowners as well as [their] competitors."[372] Their saga should not give comfort to those who think that government might bring about the transformation

---

369. Kenneth E. Scott, *The Financial Crisis: Causes and Lessons—Ending Government Bailouts as We Know Them Part I—The Crisis* 3, *available at* http://ssrn.com/abstract=1521610.

370. Case, *supra* note 367, at 12 (citing Karl E. Case & Maryna Marynchenko, *Home Appreciation in Low and Moderate Income Markets*, *in* LOW INCOME HOMEOWNERSHIP: EXAMINING THE UNEXAMINED GOAL 239 (Nicolas P. Retsinas & Eric S. Belsky eds., 2002)).

371. *See* David J. Reiss, *Fannie Mae and Freddie Mac and the Future of Federal Housing Finance Policy: A Study of Regulatory Privilege*, ALA. L. REV. (forthcoming 2010) (manuscript at 2), *available at* http://ssrn.com/abstract=1357337.

372. *Id.* (manuscript at 4).

of property easily using the steer and row approach.[373]

These problems were exacerbated by the implicit assumption that homeownership was an entitlement. For example:

> In 2004, as regulators warned that subprime lenders were saddling borrowers with mortgages they could not afford, the U.S. Department of Housing and Urban Development helped fuel more of that risky lending.
>
> Eager to put more low-income and minority families into their own homes, the agency required that two government-chartered mortgage finance firms purchase far more "affordable" loans made to these borrowers. HUD stuck with an outdated policy that allowed Freddie Mac and Fannie Mae to count billions of dollars they invested in subprime loans as a public good that would foster affordable housing.[374]

In a recent report to Congress, Neil M. Barofsky, Special Inspector General for the Troubled Asset Relief Program, warned of the pernicious consequences that might attend federal continuing efforts to support housing markets:

> - To the extent that the crisis was fueled by a "bubble" in the housing market, the Federal Government's concerted efforts to support home prices . . . risk re-inflating that bubble in light of the Government's effective takeover of the housing market through purchases and guarantees, either direct or implicit, of nearly all of the residential mortgage market.
>
> Stated another way, even if TARP saved our financial system from driving off a cliff back in 2008, absent meaningful reform, we are still driving on the same winding mountain road, but this time in a faster car.[375]

Other related factors included the actions of non-occupant speculators, who purchased houses and condominiums for quick resale at a profit and who defaulted on their mortgages "in droves" when prices stopped rising,[376] and the increased default rate on adjustable mortgages when interest rates increased.[377]

Problems resulting from an unjustified run-up in the housing supply are apt

---

373. *See supra* Part II.D.

374. Carol D. Leonnig, *How HUD Mortgage Policy Fed the Crisis; Subprime Loans Labeled "Affordable,"* WASH. POST, June 10, 2008, at A1.

375. OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM QUARTERLY REPORT TO CONGRESS 6 (Jan. 30, 2010).

376. George Lefcoe, *Should We Ban or Welcome "Spec" Home Buyers?*, 36 J. LEGIS. 1, 2 (2010). There were a sufficiently large number of such buyers so "that if only a minority of speculators defaulted . . . it could have explained all or most of the entire increase in foreclosures started." Id. (quoting Stan J. Liebowitz, *Anatomy of a Trainwreck: Causes of the Mortgage Meltdown*, *in* HOUSING AMERICA: BUILDING OUT OF A CRISIS 287, 316 (Randall G. Holcombe & Benjamin W. Powell eds., 2009)).

377. *See* Stan J. Liebowitz, *ARMs, Not Subprimes, Caused the Mortgage Crisis*, 6 THE ECONOMISTS' VOICE: Iss. 12, Art. 4, *available at* http://www.bepress.com/ev/vol6/iss12/art4).

to be long lasting. Because housing is the quintessential durable good, its quantity in a given community adjusts only very slowly to reductions in demand resulting from poor economic conditions. "Durability also implies that a negative shock to a city's productivity will continue to cause population declines over many subsequent decades."[378] Accelerating instability on the downside, "a durable housing model predicts that increases in population will be associated with small increases in prices, but decreases in population will be associated with large decreases in prices."[379]

Problems in the commercial real estate market are similar.

> As was happening in the residential market, a confluence of low interest rates, high liquidity in the credit markets, a drop in underwriting standards, and rapidly rising "bubble" values produced a boom in "bubble-induced" construction and real estate sales based on a combination of unrealistic projections and relaxed underwriting standards.[380]

In another example of misplaced confidence in the transformative powers of experts, the "mortgage meltdown" might be a "normal accident," in that the mortgage market was prone to systemic failure.[381] Specifically, two authors provide:

> Our analysis suggests that the mortgage industry's complex and tightly coupled technology made it vulnerable to failure and that the greed and fraudulent behavior of mortgage industry participants, however reprehensible, played a minor role in the meltdown. The dominant discourse on the mortgage meltdown also attributes the meltdown to insufficient regulatory control. Our normal accident analysis also suggests that insufficient regulatory oversight contributed to the debacle. But our analysis implies that simply increasing the amount of regulation over the mortgage industry is unlikely to reduce its susceptibility to failure in the future. Indeed, if additional regulation increases the system's complexity and coupling, it could increase the system's susceptibility to failure.[382]

---

378. Edward L. Glaeser & Joseph Gyourko, *Urban Decline and Durable Housing*, 113 J. POL. ECON. 345, 347 (2005).

379. *Id.*

380. CONG. OVERSIGHT PANEL, FEBRUARY OVERSIGHT REPORT: COMMERCIAL REAL ESTATE LOSSES AND THE RISK TO FINANCIAL STABILITY 20 (2010) (citing FDIC, FINANCIAL INSTITUTION LETTERS: MANAGING COMMERCIAL REAL ESTATE CONCENTRATIONS IN A CHALLENGING ENVIRONMENT (Mar. 17, 2008), www.fdic.gov/news/news/financial/2008/fil08022.html).

381. Donald Palmer & Michael W. Maher, *The Mortgage Meltdown as Normal Accidental Wrongdoing*, STRATEGIC ORGANIZATION (forthcoming), *available at* http://ssrn.com/abstract=1313406.

382. *Id.* (manuscript at 2).

E. Shifting Fee Ownership from Landlord to Tenant

One way in which the rights of tenants transformed into traditional ownership rights was by appropriating the rights of owners on the tenants' behalf. The classic example is rent control, which was traditionally associated primarily with wartime dislocation.[383] Although the U.S. Supreme Court originally upheld rent control precisely, and only, on that basis,[384] after the New Deal rent control was upheld as routine economic regulation.[385] Although landlords under rent control are entitled to a reasonable rate of return in order to avoid municipal takings liability, that principle has been applied to deny them a "fair market" return on their original investments, not discounted in value by rent control, since permitting rents to reflect full value would be "no rent control at all."[386]

Under traditional property notions, rent control, which provides for tenure for sitting tenants, expropriates the landowner's reversion in possession and part of the value inuring in use rights over the premises. Under notions of transformative property, rent control provides a windfall to some tenants, although almost all economists believe that "[a] ceiling on rents reduces the quantity and quality of housing" overall.[387]

Another device is statutory tenure for tenants apart from rent control, so that tenants could not be evicted except for narrowly defined cause at the expiration of their leases. Such a statute was upheld by the New Jersey Supreme Court in *Chase Manhattan Bank v. Josephson*.[388] One result is that a tenant placed in possession before foreclosure has rights paramount to the mortgagee,[389] with the predictable result that lenders could require extra security before lending to home purchases and a typical home buyer will not have access to additional security.

In *Hawaii Housing Authority v. Midkiff*,[390] the U.S. Supreme Court upheld a literal shifting of the fee. Upon the petition of long-term ground lessees, Hawaii condemned the underlying fee interests and resold them to the individual tenants.

---

383. *See* John W. Willis, *A Short History of Rent Control Laws*, 36 CORNELL L.Q. 54, 67-76 (1950).

384. Chastleton Corp. v. Sinclair, 264 U.S. 543, 548-49 (1924) (invalidating rent control after the emergency ceased); Block v. Hirsh, 256 U.S. 135, 157-58 (1921) (upholding District of Columbia rent control during World War I as an emergency measure).

385. *See, e.g.*, Bowles v. Willingham, 321 U.S. 503, 516-21 (1944).

386. Cotati Alliance for Better Hous. v. City of Cotati, 195 Cal. Rptr. 825, 830 (Ct. App. 1983).

387. Bruno S. Frey et al., *Consensus and Dissension Among Economists: An Empirical Inquiry*, 74 AM. ECON. REV. 986, 988, 991 (1984) (fewer than 2% of U.S. economists in a random survey disagreed).

388. 638 A.2d 1301, 1314 (N.J. 1994).

389. *But see* Security Pac. Nat. Bank v. Masterson, 662 A.2d 588, 591 (N.J. Super. Ct. Ch. Div. 1994) (excepting new sham leases intended to frustrate foreclosure).

390. 467 U.S. 229, 241 (1984).

V. PROPERTY RIGHTS AND SUSTAINABILITY

Does sustainability require a new theory of property rights? In his article bearing that title,[391] Professor Carl Circo concludes that "the traditional property framework" may "be easily reconciled" with sustainability as resource conservation, "may be sufficiently malleable . . . to accept a generational justice basis for sustainability," but seems unreceptive to "a sustainability agenda based on social justice."[392]

Private property seems an ideal device to ensure conservation, because the present value of resources and amenities encompasses their use at all times in the future, as well as the present. By assigning the residual value of an asset (net of claims against it) to a particular individual, the institution of property correspondingly assigns that person to care for it. As Aristotle put it, something that is owned by everyone is the responsibility of no one.[393] However, some scholars, such as Professor Joseph Sax,[394] more recently Professor J.B. Ruhl,[395] have called for property transformation for environmental protection.[396]

Although owners have no incentive to dissipate their own property, they do have an incentive to impose their costs on others. Common law nuisance protects both neighbors and the institution of property itself by requiring that owners bear the costs of their actions that impose unreasonable burdens on others.[397] In cases where the resulting harm is so diffused as to make recovery in tort impracticable, offsetting ("Pigovian") taxes can eliminate the incentive to engage in activities that create social harm. A carbon tax on greenhouse gas

---

391. Carl J. Circo, *Does Sustainability Require a New Theory of Property Rights?*, 58 U. KAN. L. REV. 91, 91 (2009).

392. *Id.* at 159.

393. ARISTOTLE, POLITICS 1261b ("For that which is common to the greatest number has the least care bestowed upon it. Every one thinks chiefly of his own, hardly at all of the common interest; and only when he is himself concerned as an individual. For besides other considerations, everybody is more inclined to neglect the duty which he expects another to fulfill.").

394. *See* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433 (1993). This is cited at least once by an author who defined "transformative property" to mean Sax's "property in the transformative economy," or property based on the idea of transforming something in nature (in a Lockean sense). *See* WILLIAM H. RODGERS, JR., ENVTL. L. § 4.13 (2d ed. 1994) (observing that Sax demonstrated "an outdated notion of transformative property instead of the modern view of usufructuary or ecological property").

395. *See* J. B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, ENVTL. L. (forthcoming 2010), *available at* http://ssrn.com/abstract=1517374.

396. *See* Denise C. Morgan, *What Is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER J. 99, 118 (1991) (stating that Reich's *The New Property* concludes that the government's designating something to be property is itself transformative). For discussion, see *supra* notes 190-93 and accompanying text.

397. *See* Eagle, *supra* note 210, at 583-84.

emissions is one example.[398] Another is a congestion fee imposed on using a highway.[399]

The problem of equitable availability of resources across generations is more difficult. Possible answers range from using the same conventional rate that would govern ordinary investments,[400] to dubiousness about discounting,[401] to permitting no discounting of future use at all, on the theory that generations in the distant future have the same right to resources that we do.[402] We act from our own understanding of our own needs, but we act for our progeny on the same basis. We have no magic guide to the resources and desires of those who will come long after us. After all, what would be our reaction if our forbearers in the late nineteenth century had truncated their family lives and learning because they doused their lanterns right after dinner, so that we would have enough whale oil to enjoy our meal?[403]

Our understanding of the meaning of social justice, and how it might be advanced, is tenuous as it pertains to our own generation. Extrapolations into the future might be more reliably described as projections of our own desires rather than the wisdom to discern the needs of those who will come long after us.

It might be that a transformation of property would give us the wisdom to deal with those issues well. But without additional wisdom, it is difficult to devise salutary property concepts. Perhaps a transforming structure will raise us to greater heights, but, as a product of its fallible makers, it will be built from crooked timber.

---

398. *See* Daniel H. Cole, *The* Stern Review *and Its Critics: Implications for the Theory and Practice of Benefit-Cost Analysis*, 48 NAT. RESOURCES J. 53, 62 (2008) (discussing the recommendation of a Pigovian carbon tax by an advisory panel appointed by the British government, and citing NICHOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW xvii-xviii (2007), *available at* http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm.).

399. *See* Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231 (2000).

400. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 399 (6th ed. 2003) (noting commercial rate as a possibility).

401. *See* Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1168 ("Proffering a discount rate for valuing costs and benefits that will be realized or avoided only centuries in the future and under completely uncertain societal conditions is heroic, foolish, or a mixture of both.").

402. *See, e.g.*, Edwin R. McCullough, *Through the Eye of a Needle: The Earth's Hard Passage Back to Health*, 10 J. ENVTL. L. & LITIG. 389, 436-37 (1995) ("[I]f access to nature is a right, then cost-benefit analysis breaks down. In other words, there is no amount of money which can compensate for irreversible and irreparable damage to nature.") (citation omitted)).

403. *See* Thomas Schelling, *Intergenerational Discounting*, *in* DISCOUNTING AND INTERGENERATIONAL EQUITY 99, 100-01 (Paul R. Portney & John P. Weyant eds., 1999) (averring that discounting helps the currently poorer present generation, as opposed to relatively richer, future generations).

Indiana Law Review

Volume 43 **2010** **Number 4**

NOTES

HOLIMAN V. DOVERS: AN ARGUMENT FOR A MORE IN-DEPTH ANALYSIS OF RELIGIOUS DISPUTES

KYLE D. GOBEL*

INTRODUCTION

Members of religious congregations often disagree amongst themselves over matters of religious doctrine and practice.[1] Local religious congregations that are affiliated with national religious organizations also frequently disagree with the national organization over religious issues.[2] These disagreements can cause a schism within the religious group, leading one faction to separate from the group.[3] The faction that decides to leave often attempts to take ownership of the religious real property in order to either start its own organization or join another organization that has doctrines and practices with which it more fully agrees.[4] As

---

* J.D. Candidate, 2010, Indiana University—Indianapolis; B.A., 2006, Hanover College. The author would like to thank Professor Robert A. Katz for his help and guidance. The author would also like to thank his wife for all her support throughout the Note-writing process.

1. *See, e.g.*, Holiman v. Dovers, 366 S.W.2d 197, 199-201 (Ark. 1963) (discussing a dispute amongst members of a congregation over the doctrines taught by the church's pastor); Electa Draper, *Episcopal Church's Last Rites in Englewood Fueled by Gay Divide*, THE DENVER POST, August 28, 2009, *available at* http://www.denverpost.com/commented/ci_13219779?source=commented-business (discussing a dispute amongst members of an Episcopal congregation over "ordination of gay and lesbian priests" that "disintegrate[d]" the nearly-100-year-old church).

2. *See, e.g.*, Sean D. Hamill, *After a Theological Split, a Clash Over Church Assets*, N.Y. TIMES, October 6, 2008, at A17 (discussing the Pittsburgh Episcopal diocese's split from its denomination over issues such as ordination of openly gay and women bishops and "whether Jesus is the son of God and the only way to salvation."); Robert W. Tuttle, *Question and Answer: Courts Will Decide Church Property Disputes*, THE PEW FORUM ON RELIGION & PUBLIC LIFE, June 12, 2008, http://pewforum.org /events/ ?EventID=188 (highlighting several disputes across the U.S. between local congregations and national religious organizations over theological issues).

3. *See, e.g.*, Greg Mellen, *Former Episcopal Church Takes Suit to High Court*, LONG BEACH PRESS-TELEGRAM, May 7, 2009, at 2A (discussing an Anglican congregation that left the Episcopal Church because the congregation disagreed with the national organization's stance on several social issues).

4. *See, e.g.*, Ann Rodgers, *Presbytery Says it, Not Court, Should Decide Property Dispute*, PITTSBURGH POST-GAZETTE, May 9, 2008, *available at* http://www.post-gazette.com /pg/08130/880357-85.stm (discussing "a property dispute between Washington Presbytery and most

of June 2008, "about 100 pending lawsuits involving a national denomination and a local congregation fighting over who owns the church property used by the congregation" were making their way through U.S. courts.[5]

The U.S. Supreme Court has provided two different methods for U.S. courts to use when adjudicating disputes over religious property: The deference approach and the neutral principles of law approach.[6] When employing the deference approach, U.S. courts must adjudicate religious property disputes in different ways depending on the type of religious property dispute at issue.[7] In some cases, courts must determine the intent of the original property donor, decide which members of the congregation have been faithful to that original intent, and then decide which members have deviated from the religious doctrines that the original donor intended.[8] In other cases, courts must defer to the decision made by the majority of the current congregation.[9] In the final category of cases, courts must defer to the decision made by the adjudicative body of the larger denominational organization.[10]

The U.S. Supreme Court has also held that, when deciding religious property disputes, it is constitutionally permissible for U.S. courts to use a "neutral principles of law" approach.[11] Such an approach may involve an examination of "the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property."[12]

The problem with using different methods to adjudicate religious disputes is that courts are inconsistent in the amount of scrutiny they give religious doctrine and practice.[13] A series of decisions by the Arkansas Supreme Court is evidence

---

former members of Peters Creek United Presbyterian Church, who voted . . . to leave the Presbyterian Church (USA) for the more theologically conservative Evangelical Presbyterian Church.").

5. Tuttle, *supra* note 2.

6. *See* Jones v. Wolf, 443 U.S. 595, 602-03 (1979) (describing "the 'neutral principles of law' approach" to adjudicating religious property disputes); Watson v. Jones, 80 U.S. 679, 722-27 (1871) (setting out the deference approach to adjudicating religious property disputes).

7. *Watson*, 80 U.S. at 722-27.

8. *Id.* at 723.

9. *Id.* at 724-25.

10. *Id.* at 726-27.

11. *Wolf*, 443 U.S. at 604.

12. *Id.* at 603.

13. *Compare* Holiman v. Dovers, 366 S.W.2d 197, 200-01 (Ark. 1963) (examining traditional church doctrines in order to determine whether the teachings of the church's pastor differed from those traditional doctrines), *with* Calvary Christian Sch., Inc. v. Huffstuttler, 238 S.W.3d 58, 66-67 (Ark. 2006) (refusing to examine a religious school's secularly-worded dispute-resolution policy in order to determine whether a student's disenrollment for his family's failure to comply with the policy was tortious), El-Farra v. Sayyed, 226 S.W.3d 792, 796-97 (Ark. 2006) (refusing to determine whether the Islamic Center of Little Rock breached an employment contract with its

of this inconsistency.[14] In 1963, the court decided *Holiman v. Dovers*,[15] a case where the court delved deeply into doctrinal issues to determine which group in a disagreeing congregation constituted the true members of the church.[16] In several more recent cases, however, the court determined that it did not have subject matter jurisdiction to adjudicate controversies involving religious questions.[17]

The Arkansas Supreme Court can greatly diminish the level of inconsistency in its adjudication of religious disputes by adopting an approach akin to the neutral principles of law analysis outlined by the U.S. Supreme Court[18] to adjudicate most religious disputes. Part I of this Note gives a brief overview of the U.S. Supreme Court's decisions regarding religious property disputes. Part II of this Note introduces and analyzes some of the arguments and policy considerations that should be taken into account when deciding between the application of either the *Watson* deference approach[19] or the *Wolf* neutral principles of law approach.[20] Part III of this Note analyzes the Arkansas Supreme Court's decision in *Holiman*. Part IV of this Note analyzes the Arkansas Supreme Court's decisions in *Calvary Christian Sch. Inc. v. Huffstuttler*,[21] *El-Farra v. Sayyed*,[22] *Belin v. West*,[23] and *Gipson v. Brown II*.[24] Part V of this Note recommends that, in a legal regime where the inquiry into religious doctrines and practices found in *Holiman* is acceptable, Arkansas courts should, as much as is constitutionally allowable, inquire into religious questions in other types of religious disputes. Part V further argues that, because of the in-depth inquiry

---

Imam because such a decision would have involved inquiry into religious matters in violation of the First Amendment of the U.S. Constitution), Belin v. West, 864 S.W.2d 838, 842 (Ark. 1993) (refusing to examine a church's Book of Discipline in order to determine whether someone could reasonably rely on a promise by a church bishop that he would be given a position within the church because such an examination would violate the First Amendment of the U.S. Constitution), *and* Gipson v. Brown, 749 S.W.2d 297, 301 (Ark. 1988) (refusing to examine church members' claims that, pursuant to state statutes, they were entitled to inspect the church's books and to elect a new board of directors, because such an inquiry would have involved the court in "purely ecclesiastical concerns").

14. *See* cases cited *supra* note 13.

15. 366 S.W.2d at 199.

16. *Id.* at 200-01.

17. *See Huffstuttler*, 238 S.W.3d at 66-67; *El-Farra*, 226 S.W.3d at 796-97; *Belin*, 864 S.W.2d 842; *Gipson II*, 749 S.W.2d at 301; *see also* Viravonga v. Samakitham, 279 S.W.3d 44, 49-50 (Ark. 2008) (noting that in *Huffstuttler*, *El-Farra*, *Belin*, and *Gipson II*, the court "lack[ed] subject-matter jurisdiction to hear [a] religious dispute.").

18. Jones v. Wolf, 443 U.S. 595, 603 (1979).

19. Watson v. Jones, 80 U.S. 679, 726-27 (1871).

20. *Wolf*, 443 U.S. at 603.

21. 238 S.W.3d 58 (Ark. 2006).

22. 226 S.W.3d 792 (Ark. 2006).

23. 864 S.W.2d 838 (Ark. 1993).

24. 749 S.W.2d 297 (Ark. 1988).

allowed in the first category of *Watson* religious property disputes,[25] American courts should at least adopt the arguably more in-depth *Wolf* neutral principles of law approach over the *Watson* deference approach and should undertake adjudication of other types of religious disputes whenever constitutionally allowed.

I. THE U.S. SUPREME COURT'S TREATMENT OF RELIGIOUS PROPERTY DISPUTES

This section gives a brief overview of the U.S. Supreme Court's treatment of religious property disputes. *Watson v. Jones* provided a framework for U.S. courts to use when determining how to adjudicate religious property disputes.[26] *Jones v. Wolf* updated this original framework by giving courts another method to use when adjudicating religious property disputes: the neutral principles of law approach.[27]

A. Watson v. Jones

Watson originated from a dispute among members of a Presbyterian Church over the issue of slavery.[28] In determining that the church at issue belonged to the church members who were loyal to the national Presbyterian Church in the United States,[29] the U.S. Supreme Court enumerated three types of religious property disputes and mandated that courts adjudicate each type of dispute using a different method.[30]

The first category of disputes involve property given in trust to a congregation, and, "by the express terms of the [trust document] devoted to the teaching, support, or spread of some specific form of religious doctrine or belief."[31] In this class of cases the court must determine the intent of the original donor, decide which members of the congregation have been faithful to that original intent, and decide which members have deviated from the religious doctrines that the original donor intended.[32] The second category of disputes involve the property of congregations that are not affiliated with a larger religious organization.[33] In this class of cases, the court must defer to any decision made by the majority of the current congregation.[34] The third category of disputes involve property of congregations that are a part of larger denominations which have "superior ecclesiastical tribunals with a general and ultimate power" to make

---

25. Watson v. Jones, 80 U.S. 679, 723-24 (1871).
26. *Id.* at 722-27.
27. Jones v. Wolf, 443 U.S. 595, 602-03 (1979).
28. *Watson*, 80 U.S. at 684.
29. *Id.* at 734.
30. *Id.* at 722-27.
31. *Id.* at 722.
32. *Id.* at 723-24.
33. *Id.* at 722.
34. *Id.* at 724-26.

decisions that are binding upon all member congregations.[35] In this class of cases, the court must defer to the decision made by the adjudicative body of the larger denominational organization.[36]

B. Jones v. Wolf

The Court revisited a state adjudication of a religious property dispute in *Jones v. Wolf*. In *Wolf*, the Court decreed that, when deciding religious property disputes, courts may examine documents such as "the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property."[37] After *Wolf*, American courts were no longer bound to defer to a decision made by the adjudicative body of a hierarchical church,[38] as they were under *Watson*.[39]

The Court tempered its allowance of this seemingly-more-intrusive method of adjudicating religious property disputes with the caveat that, "[i]f in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."[40]

II. DEFERENCE OR NEUTRAL PRINCIPLES OF LAW?

It is necessary to briefly consider the many arguments and policy considerations[41] that counsel both for and against the *Watson* deference approach

---

35. *Id* at 722-23.

36. *Id.* at 727.

37. Jones v. Wolf, 443 U.S. 595, 603 (1979).

38. *Id.* at 604 (holding that it is constitutionally permissible for U.S. courts to decide disputes over religious property using a "neutral principles of law" approach). *See also* Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 FORDHAM L. REV. 335, 335 (1986) (citing *Wolf*, 443 U.S. at 602-06) (noting that, in *Wolf*, "the Supreme Court made clear that courts have at their disposal more than one method for resolving [religious property disputes]").

39. *Watson*, 80 U.S. at 727.

40. *Wolf*, 443 U.S. at 604 (citing *Serbian E. Orthodox Diocese for the U.S. and Canada v. Milivojevich*, 426 U.S. 696, 709 (1976)).

41. See Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1865 (1998), who argues that, from a policy standpoint, the best approach to adjudicating church property disputes:

> would: (1) accord churches significant autonomy of governance; (2) afford individuals freedom of religious worship; (3) give effect to the intent of people who donate money for the purchase of church property and who pay for its upkeep; (4) treat different religious groups in an evenhanded way, without favoring any particular doctrine or form of organization; (5) replicate the standards used in respect to other charitable and nonprofit organizations; and (6) keep courts out of determining ecclesiastical matters for which they are ill-suited.

and the *Wolf* neutral principles of law approach in order to determine which of these seemingly-irreconcilable approaches U.S. courts should adopt. Because the neutral principles of law approach best addresses the concerns of both deference proponents and neutral principles proponents, this Note advocates for the adoption of the neutral principles approach by all U.S. states.[42]

Any analysis of the relationship between religious organizations and the state must begin with the religion clauses of the First Amendment to the United States Constitution, which reads, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[43] A detailed analysis of the First Amendment issues implicated by judicial resolution of religious property disputes is beyond the scope of this Note. It is important to acknowledge, however, that some legal thinkers believe that the *Watson* deference approach is constitutionally preferable to the neutral principles of law approach, or at least represents "the lesser of two constitutional evils,"[44] because it arguably involves less inquiry into religious questions.[45]

Much of the support for the deference approach stems from a conclusion that a major purpose of the Establishment Clause is to protect religious organizations from the state and vice versa.[46] According to Justice Black, the Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion."[47] Justice Black stated that "[t]he Establishment Clause thus stands as an expression of principle on the part of the Founders . . . that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[48] Because the deference approach only requires an inquiry into a religious organization's governmental structure to determine whether the organization's decision controls,[49] the deference approach arguably alleviates Justice Black's

---

42. *See* discussion *infra* Part V.B.

43. U.S. CONST. amend. I.

44. Nathan Belzer, *Deference in the Judicial Resolution of Intrachurch Disputes: The Lesser of Two Constitutional Evils*, 11 ST. THOMAS L. REV. 109, 139 (1998); *see also Wolf*, 443 U.S. at 610 (Powell, J., dissenting) (arguing that application of the neutral principles of law approach "is more likely to invite intrusion into church polity forbidden by the First Amendment.").

45. *See, e.g.*, *Wolf*, 443 U.S. at 611 (Powell, J., dissenting) (stating that allowing the neutral principles of law analysis "inevitably will increase the involvement of civil courts in church controversies").

46. *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 431-32 (1962); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969); Eric G. Andersen, *Protecting Religious Liberty Through the Establishment Clause: The Case of the United Effort Plan Trust Litigation*, 2008 UTAH L. REV. 739, 777 (2008) (noting that "[a] strand of Establishment Clause policy with venerable origins is that, whatever harm establishing a religion may do to the state, it may also have the effect of corrupting religion itself.").

47. *Engel*, 370 U.S. at 431; *see also* Andersen, *supra* note 46 (quoting *id.*).

48. *Engel*, 370 U.S. at 431-32 (citations omitted); s*ee also Mary Elizabeth Blue Hull*, 393 U.S. at 449; Andersen, *supra* note 46 (quoting *Engel*, 370 U.S. at 431-32).

49. Watson v. Jones, 80 U.S. 679, 727 (1871).

concerns.

Proponents of the deference approach argue that it is necessary to defer to decisions made by a religious organization's adjudicatory body because further inquiry into the controversy would involve civil judges in an area in which they are not competent.[50] Neutral principles opponents argue that civil court scrutiny of the determinations of religious adjudicatory bodies allows such determinations to move "from the more learned tribunal in the law which should decide the case, to one which is less so."[51] Further, deference proponents argue that civil court judges start from completely different baselines than church tribunals, and are therefore incapable of coming to an informed conclusion on the merits of a religious dispute.[52] In *Serbian Eastern Orthodox Diocese for the U.S. and Canada v. Milivojevich*,[53] Justice Brennan wrote "ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are . . . hardly relevant to such matters . . . ."[54]

Another reason proponents of deference argue courts should stay out of religious conflicts as much as possible is because, when civil courts adjudicate religious controversies, there is a danger that civil decision-makers will allow their political leanings to affect the adjudication of a dispute.[55] Courts located near the area where the religious dispute is taking place may feel intense pressure

---

50. *See, e.g.*, Arlin M. Adams & William R. Hanlon, Jones v. Wolf*: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1291-92 (1980) (noting that "[c]hurch controversies that are perceived to involve purely ecclesiastical matters ordinarily are dismissed by civil courts as beyond their competence, without inquiry into the merits"); Michael G. Weisberg, *Balancing Cultural Integrity Against Individual Liberty: Civil Court Review of Ecclesiastical Judgments*, 25 U. MICH. J.L. REFORM 955, 964 (1992) (citations omitted) (arguing that "[c]ivil courts not only lack authority to resolve religious conflicts, but they are also incompetent to do so"). *But see* Sirico, Jr., *supra* note 38, at 350 (arguing that the deference approach "assumes that courts are competent to determine where a church's decisionmaking authority lies, whether it has made a decision, and what the decision is").

51. Watson v. Jones, 80 U.S. 679, 729 (1871); *see also* Adams & Hanlon, *supra* note 50, at 1293 n. 8 (quoting *id.*).

52. *See* Serbian E. Orthodox Diocese for the U.S. and Canada v. Milivojevich, 426 U.S. 696, 714-15 (1976); Andersen, *supra* note 46, at 774-75 (quoting *id.*).

53. 426 U.S. at 697.

54. *Id.* at 714-15 (footnote omitted); *see also* Andersen, *supra* note 46, at 774-75 (quoting *id.*).

55. Greenawalt, *supra* note 41, at 1851; *see also* Alvin J. Esau, *The Judicial Resolution of Church Property Disputes: Canadian and American Models*, 40 ALBERTA L. REV. 767, 783 (2003) (noting that, when analyzing a particular Canadian religious property dispute, "[o]ne may question whether the politics of the judges—particularly in regard to pro- or anti-Catholic bias—had as much to do with the determination of the trusts, as did the actual conflicting evidence as to what the original purpose of the congregations were in terms of the affiliation issue.").

to side with the faction whose political stances the court most agrees with.[56] This danger seems particularly relevant in situations where a "conservative" faction of a religious organization breaks from a more "liberal" local congregation or national religious organization, or vice versa.[57] Furthermore, Professor Eric G. Andersen notes that "[r]eligious groups who operate at the margins of society and who refuse to abide by conventional social and moral norms typically generate fear and loathing within mainstream society."[58] It is easy to envision a scenario where a court feels pressure to rule against one of these politically unpopular groups.

Deference proponents also argue its merits from a "contractual" standpoint.[59] Justice Powell's dissent in *Wolf* stated that civil courts should do no more than determine "where within the religious association the rules of polity, *accepted by its members before the schism*, had placed ultimate authority over the use of the church property."[60] Because members of a religious group accept the rules of the organization when they join the group they are, essentially, at the mercy of the organization's adjudicative body.[61] Members of religious organizations accept the rules of the organization when they become members because, deference proponents argue, "[r]eligious organizations come before [courts] in the same attitude as other voluntary associations . . . and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints."[62] Therefore, according to deference proponents, it is important that religious associations are able to partner with other religious associations without fear of civil court meddling.[63]

Finally, deference proponents argue that the deference approach has two important virtues: it is predictable, and it is relatively easy to apply.[64] When two factions acknowledge the organization's structure and admit that a group within the organization has been given the power to decide property disputes "[t]he major difficulties occasioned by [the deference] approach . . . are the identification of the authoritative decisionmaking body within the hierarchy and

---

56. Greenawalt, *supra* note 41, at 1851.

57. *See, e.g.*, Kathleen E. Reeder, *Whose Church Is It, Anyway? Property Disputes and Episcopal Church Splits*, 40 COLUM. J.L. & SOC. PROBS. 125, 126 (2006) (analyzing a rift within the American Episcopal Church over the ordination of an openly gay bishop); Tuttle, *supra* note 2 (discussing religious property disputes in California, Colorado, New York, and Virginia, all arising from disagreements among "conservative" and "liberal" members of religious organizations over various theological issues).

58. Andersen, *supra* note 46, at 785.

59. For an in-depth discussion of this "contractual" theory of the religious organization/member relationship, see Weisberg, *supra* note 50, at 986-96; *see also* Adams & Hanlon, *supra* note 50, at 1299 (citation omitted).

60. Jones v. Wolf, 443 U.S. 595, 618-19 (1979) (Powell, J., dissenting) (emphasis added).

61. *See id.*

62. Watson v. Jones, 80 U.S. 679, 714 (1871).

63. *See, e.g.*, Adams & Hanlon, *supra* note 50, at 1299-1300.

64. *Id.* at 1294; *see also* Reeder, *supra* note 57, at 133.

the determination of what that body has decided."[65] Because this relatively easy inquiry results in a determination that is "utterly predictable,"[66] religious organizations may be able to organize their affairs in such a way that the expectations of all parties involved are met with regard to the ownership and use of the property.[67]

Although, as stated earlier, a detailed analysis of all First Amendment issues implicated by civil court adjudication of religious property disputes is beyond the scope of this Note, it is important to point out that some neutral principles proponents believe application of the deference approach raises serious First Amendment issues.[68] Judge Arlin M. Adams and William R. Hanlon believe that application of the deference approach raises Free Exercise Clause concerns.[69] Judge Adams and Hanlon argue "[t]ying control of a local church to a hierarchical organization, regardless whether the local church in fact has relinquished control, effectively limits the ability of local church congregations to establish the terms of their association with more general church organizations."[70] Furthermore, Judge Adams and Hanlon argue that the specter of forfeiting its land and its religious building to a national organization would chill the local religious body from associating itself with a national organization, even if it was the congregation's wish to do so.[71] Additionally, presuming local congregation approval of a national organization's primacy with regard to property matters places legal hurdles in front of the congregation that limit its ability to create relationships with other religious organizations.[72] Because of this collection of potential issues, Judge Adams and Hanlon argue that civil court deference to the decision of a national religious organization regarding a dispute over religious property leads to Free Exercise concerns.[73]

Judge Adams and Hanlon further argue the deference approach is in conflict with the Establishment Clause because the deference approach incentivizes religious groups to organize hierarchically.[74] Judge Adams and Hanlon argue that this preference for hierarchical organization violates the Establishment Clause because the Establishment Clause stands for the principle that "judicial support

---

65. Adams & Hanlon, *supra* note 50, at 1294; *see also* Reeder, *supra* note 57, at 133 (noting that "[a] principle advantage of [the deference] approach is that it gives lower courts a bright-line rule to apply while allowing them to avoid adjudicating questions of faith.").

66. Reeder, *supra* note 57, at 133.

67. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 603-04 (1979). *But see* Weisberg, *supra* note 50, at 999 (arguing that "the neutral-principles approach provides religious societies with the flexibility to structure their internal relationships according to their own beliefs and administrative needs").

68. *See, e.g.*, Adams & Hanlon, *supra* note 50, at 1337-38.

69. *Id.* at 1337-38.

70. *Id.* at 1337.

71. *Id.*

72. *Id.*

73. *Id.* at 1337-38.

74. *Id.*

of one institutional form of church polity over another is prohibited . . . ."[75] Judge Adams and Hanlon believe that deference essentially amounts to an unconstitutional "presumption" in favor of national religious organizations over smaller local bodies.[76] Rather then resorting to this unconstitutional "presumption" in favor of the national religious organization, U.S. courts should be required to examine the available evidence and conclude, on the merits of the case, whether the national organization or the local congregation is legally entitled to ownership of the disputed property.[77] Because they are concerned with both the Free Exercise and Establishment issues raised by application of the deference approach to disputes over religious property, Judge Adams and Hanlon believe U.S. courts should adopt the neutral principles of law approach.[78]

Justice Rehnquist argued that the deference approach raises First Amendment issues because, by deferring to a determination made by the highest adjudicatory body of a national religious organization, courts risk treating religious organizations differently than non-religious organizations, thus implicating the Establishment Clause.[79] In his dissenting opinion in *Milivojevich*, Justice Rehnquist argued "[t]o make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would, in avoiding [Free Exercise issues], itself create far more serious problems under the Establishment Clause."[80] Justice Rehnquist believed that the lower courts should have answered the legal question at issue "by application of the canon law of the church, just as they would have attempted to decide a similar dispute among the members of any other voluntary association."[81] Justice Rehnquist argued that, because courts would not "rubber-stamp" the decision of a non-religious organization, courts should not afford a higher level of deference to religious organizations.[82]

One criticism of the neutral principles approach is that, more so than the deference approach, neutral principles allows civil courts to delve deeply into

---

75. *Id.*; *see also* Weisberg, *supra* note 50, at 969 (footnotes and citations omitted) (arguing that "the Establishment Clause requirement that government not prefer some religious groups over others must be understood to prohibit civil courts from extending greater deference toward hierarchical religious authorities than toward congregational tribunals").

76. Adams & Hanlon, *supra* note 50, at 1337-38.

77. *Id.*

78. *Id.* at 1338.

79. Serbian E. Orthodox Diocese for the U.S. and Canada v. Milivojevich, 426 U.S. 696, 734 (1976) (Rehnquist, J., dissenting); *see also* Andersen, *supra* note 46, at 769 (quoting *id.*).

80. *Milivojevich*, 426 U.S at 734. (Rehnquist, J., dissenting); *see also* Andersen, *supra* note 46, at 769 (quoting *id.*).

81. *Milivojevich*, 426 U.S. at 726; *see also* Andersen, *supra* note 46, at 769 (quoting *id.*).

82. *Milivojevich*, 426 U.S. at 734; *see also* Andersen, *supra* note 46, at 769 (quoting *id.*, and noting that Justice Rehnquist's stance was "that the necessary neutrality was to be achieved by treating religious organizations evenhandedly with non-religious ones").

religious questions in order to adjudicate a religious property dispute.[83] This line of thinking ignores, however, the *Wolf* Court's mandate that civil courts *not* intimately involve themselves in religious questions in order to adjudicate religious property disputes.[84] When this mandate is taken into account, it becomes evident that the main criticism of the neutral principles approach largely falls by the wayside.

Moreover, should a religious property dispute ever arise that would require a civil court to examine something other than "the langue of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property,"[85] a civil court is constitutionally bound to "defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."[86] In other words, if a religious property dispute cannot be adjudicated without making a searching inquiry into religious issues a court must employ the deference approach.[87] Deference proponents, then, appear to be able to have their cake and eat it too.

Although both the deference and neutral principles approaches are flawed, the neutral principles of law approach best addresses the legitimate concerns of the proponents of both neutral principles and deference. Therefore, this Note advocates for the adoption of the neutral principles of law approach by all states.

III. THE THIRD *WATSON* CATEGORY: *HOLIMAN V. DOVERS*

In order to determine how U.S. civil courts should approach the adjudication of religious disputes, it is helpful to first analyze the Arkansas Supreme Court's *Holiman* decision, a case where a civil court delved deeply into questions of religious doctrine and practice in order to determine which faction of a feuding church was entitled to possession and use of the religious real property at issue.[88] Despite the concerns that arise when civil courts decide religious questions,

---

83. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 618 (Powell, J., dissenting) (arguing that the deference approach allows courts to "refrain[] from direct review and revision of decisions of the church on matters of religious doctrine and practice that underlie the church's determination of intrachurch controversies, including those that relate to control of church property").

84. *Id.* at 604 (majority opinion) (citing *Milivojevich*, 426 U.S. at 709) (holding that "[i]f in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body"); *see also* Adams & Hanlon, *supra* note 50, at 1327-28 (noting that civil court dependence on religious laws in the examination and interpretation of ecclesiastical instruments "might abridge the distinct constitutional rule . . . that civil adjudication of church-property disputes must avoid modes of decision that require inquiry into ecclesiastical matters of faith and doctrine").

85. *Wolf*, 443 U.S. at 603.

86. *Id.* at 604 (citing *Milivojevich*, 426 U.S. at 709).

87. *Wolf*, 443 U.S. at 604 (citing *Milivojevich*, 426 U.S. at 709).

88. Holiman v. Dovers, 366 S.W.2d 197, 200-01 (Ark. 1963).

Holiman was properly decided, not only because the approach taken by the court was authorized by the U.S. Supreme Court,[89] but because the intentions of the relevant parties involved were vindicated.

A. Analysis of the Arkansas Supreme Court's Decision in Holiman v. Dovers

In a line of cases exemplified by *Holiman v. Dovers,* U.S. civil courts have involved themselves intimately in matters of religious doctrine in order to decide which faction in a religious dispute constitutes the "true" church and, thus, the true owners of the religious real property at issue.[90] In *Holiman*, the disputed religious property was originally granted for use as a Landmark Missionary Baptist Church.[91] The minority faction sued the majority faction and the church's pastor, A.Z. Dovers, to stop Dovers from espousing doctrines the minority believed were "fundamentally contrary" those held by the church throughout its history.[92] The minority group called to the stand nine ministers of the Landmark Missionary Baptist faith "whose total ministerial experience exceeded 230

---

89. This Note maintains that *Holiman* is a case that falls under the first category of *Watson* religious property disputes: Disputes that involve property given in trust to a congregation, and, "by the express terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief." Watson v. Jones, 80 U.S. 679, 722 (1871). This Note takes this stance because, as the *Holiman* dissent points out, the religious property at issue was granted for use as the home of a particular faith. *Holiman*, 366 S.W.2d at 202 (McFaddin, J., dissenting). In this class of cases, the U.S. Supreme Court has mandated that U.S. courts determine the intent of the original donor, decide which members of the congregation have been faithful to the donor's original intent, and decide which members have deviated from the religious doctrines that the original donor intended. *Watson*, 80 U.S. at 723-24. This is exactly the kind of inquiry the *Holiman* majority undertook. *Holiman*, 366 S.W.2d at 199-201 (majority opinion).

Interestingly, commentators disagree as to how to categorize *Holiman*. One commentator cites *Holiman* as an example of a case where "property was . . . awarded . . . to the majority in a local church dispute." Giovan Harbour Venable, *Courts Examine Congregationalism*, 41 STAN. L. REV. 719, 726 (1989) (citing *Holiman*, 366 S.W.2d at 197). However, in *Holiman*, it was actually the minority that was victorious. *Holiman*, 366 S.W.2d at 201. Another commentator cites *Holiman* as an example of a case where a court "prohibited religious factions from using church buildings for 'purposes constituting a fundamental departure from the traditional faith, customs, usages, and practices of the church.'" Weisberg, *supra* note 50, at 1000 n.189 (quoting *Holiman*, 366 S.W.2d at 206-07). Yet another commentator cites *Holiman* as an example of state law application of "the departure-from-doctrine test." Sirico, Jr., *supra* note 38, at 338-39 n.12 (citing *Holiman*, 366 S.W.2d at 206-07). Neither of these commentators, however, identify the *Watson* Court's express authorization of the *Holiman* court's approach. *See Watson*, 80 U.S. at 723-24; *Holiman*, 366 S.W.2d at 199-201. Regardless how *Holiman* is categorized, for the purposes of this Note it is the court's *approach* to adjudicating the dispute, compared to the approach the court took in other cases implicating religious issues, that is truly important. *See* cases cited *supra* note 13.

90. *Id.*

91. *Id.* at 202 (McFaddin, J., dissenting).

92. *Id.* at 199 (majority opinion).

years."[93] These ministers all testified as to the fundamental beliefs of the Landmark Missionary Baptist faith, including the beliefs "that a person who has been saved cannot later become lost [and] the belief that the unpardonable sin (the rejection of Christ) can be committed only by the unsaved . . . ."[94] Dovers, the defendants' sole witness, had very little formal or theological education.[95] Dovers admitted to the court that he did, in fact, espouse doctrines that were different than those traditionally held by the church.[96] He preached, for example "that a person who has been saved can later be lost, [and] that the saved can be guilty of the unpardonable sin."[97] Because Dovers did not deny that he professed doctrines different than those the church had traditionally held[98] the court barred him from continuing to lead the church.[99]

It is important to note that in, in this case, it was the minority group who was successful in stopping the majority.[100] Prior to the minority's lawsuit, the group supporting Dovers was able to use its majority position to defeat a motion by the minority group to fire Dovers.[101] After this vote took place the members of the minority group were told that they would no longer have a say in church matters until they apologized for their campaign to have Dovers dismissed.[102]

The *Holiman* religious property dispute is an excellent example of a situation deference opponents fear: "[N]onintervention" by civil courts in religious disputes "subject[ing] dissident church groups to 'unbounded domination by oppressive religious authorities.'"[103] Unfettered deference to the decision of a majority faction in a local religious organization would leave the minority faction vulnerable to utter "domination" by the majority in all facets of religious decision-making, up to and including decisions regarding the disposition of the organization's religious real property.[104] Civil court adjudication of religious disputes allows a minority "dissident" faction, such as the one in *Holiman*,[105] a forum in which to have their rights vindicated rather than leaving the minority faction exposed to "domination" by the rival majority faction.[106]

---

93. *Id.* at 200.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 201.
100. *Id.* at 199.
101. *Id.*
102. *Id.*
103. Adams & Hanlon, *supra* note 50, at 1297-98 (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-12, at 880 (1978)).
104. *See, e.g.*, *id.* (quoting TRIBE, *supra* note 103, AMERICAN § 14-12, at 880).
105. 366 S.W.2d at 199 (noting that the anti-Dovers faction had forty-seven members, whereas the pro-Dovers faction had fifty-four members).
106. *See* Adams & Hanlon, *supra* note 50, at 1297-98 (quoting TRIBE, *supra* note 103, AMERICAN § 14-12, at 880).

In many ways, once the Arkansas Supreme Court decided it was going to adjudicate this dispute, *Holiman* was an easy case. Dovers admitted he was preaching doctrines that were different from those typically taught in a Landmark Missionary Baptist Church,[107] the type of church the real property at issue was originally granted to be.[108] The complaining faction countered the majority faction with a group of apparently credible witnesses who attested to their opinions as to what the basic doctrines of the church were and should be.[109] If a civil court finds that one faction produces a group of very credible witnesses, whereas the other faction produces a single witness whose credibility to espouse on the beliefs and practices of the church is questionable (which is the situation that occurred in *Holiman*[110]), then the court should not have a problem determining what the fundamental doctrines of the religious group are and which of the feuding factions is staying true to those doctrines.

Furthermore, this type of decision must be distinguished from a decision as to which faction is following doctrines that are in some way "better" than those of the other faction. As the *Holiman* court wrote, "we have no concern whatever with the merits of the theological differences between these parties. The majority . . . are of course at liberty to adopt any religious belief they choose [and] to engage a pastor who will preach the doctrines of their choice."[111] The court stressed, however, that "the majority are not entitled to devote the property of the [church] to a faith contrary to that for which it was dedicated."[112] It is easy to imagine a situation that would be much more difficult to adjudicate than *Holiman*. Both sides may produce a series of equally credible witnesses who testify as to different fundamental church doctrines, or the distinctions drawn by the witnesses could be too fine or esoteric for civil court judges to effectively grasp.[113] However, in a situation where a court is able to distinguish between the credibility of different witnesses, and the differences in the doctrines expounded are so large that the court can easily understand what is at issue, then the court can and should decide which faction represents the "true" followers of the religion and, consequently, which faction should control the religious real property at issue.

It is also significant that the *Holiman* court did not undertake the task of parsing fine theological distinctions that only interested the church's clergy.[114]

---

107. The court noted that it was "substantially undisputed that Elder Dovers' beliefs were contrary to the accepted doctrines and usages of the church." *Holiman*, 366 S.W.2d at 200.

108. *Id.* at 202 (McFaddin, J., dissenting).

109. *Id.* at 200 (majority opinion) (noting that the "leading clergymen" had "total ministerial experience exceed[ing] 230 years").

110. *Id.*

111. *Id.* at 201.

112. *Id.*

113. *See, e.g.*, Adams & Hanlon, *supra* note 50, at 1291-92 (noting that courts often believe disputes over religious doctrine to be "beyond their competence "); *see also* Weisberg, *supra* note 50, at 964-65.

114. *Holiman*, 366 S.W.2d at 200-01.

Rather, the court said that, as a prerequisite to deciding the dispute between the feuding factions, the court first had to determine "whether the differences are so important as to justify the intervention of a court of equity.[115] According to the court, the differences between the factions had to be "fundamental" in order to require civil court adjudication.[116] In determining whether a disputed doctrinal point is "fundamental," the court said it would look only at the offered evidence as to the doctrines the church has taught and followed throughout its history.[117] The court noted that multiple clergymen of the Landmark Missionary Baptist faith testified that the doctrines at issue were, in fact, fundamental, and that a churchgoer who did not believe such doctrines as traditionally taught by the church was not a true church member.[118] Some members of the minority faction were so convinced as to the centrality of these beliefs to the church's faith that, after Dovers's arrival, they left the church.[119] The court intervened in this controversy because it was so important to the congregation that it was tearing apart the nearly-sixty-year-old church.[120] If courts limit themselves to adjudicating such vitally important issues, civil court intervention in religious disputes will likely be exceedingly rare and will be limited to situations that could potentially end up much worse without civil court intervention.

IV. INCONSISTENCIES IN ARKANSAS'S APPROACH TO ADJUDICATING RELIGIOUS PROPERTY DISPUTES

In subsequent cases that have come before the Arkansas Supreme Court, the fact that the court did not apply an approach similar to the approach taken in *Holiman* led to outcomes that were inconsistent with *Holiman*.[121] These inconsistencies could be alleviated if Arkansas courts would apply similar methods used in *Holiman*, a religious property dispute, to more cases involving religious issues, even those that do not fall under the category of religious property disputes.

A. Analysis of Calvary Christian School, Inc. v. Huffstuttler

In *Calvary Christian School, Inc. v. Huffstuttler*,[122] the Arkansas Supreme Court decided a dispute regarding a student's dismissal from a parochial

---

115. *Id.* at 200.

116. *Id.* (citations omitted).

117. *Id.* at 200-01.

118. *Id.*

119. *Id.*; *see also* Parker v. Harper, 175 S.W.2d 361, 365 (Ky. Ct. App. 1943) (noting that, in a religious property dispute, the doctrines at issue were "vital and substantial" enough to justify the intervention of a civil court to vindicate the rights to the church property of the faction who was hewing most closely to the doctrines of the church founders).

120. *Holiman*, 366 S.W.2d at 199.

121. *See* cases cited *supra* note 13.

122. 238 S.W.3d 58 (Ark. 2006).

school.[123] While attending the Calvary Christian School, Preston Huffstuttler noticed that a video camera had been surreptitiously placed in the duct work of one of the school's classrooms.[124] Preston informed his teacher and his parents about his discovery.[125] At a gathering attended by other parents of Calvary Christian schoolchildren, Preston's family confronted school leaders about the hidden camera.[126] At the meeting, a Calvary Christian principal confirmed the parents' accusations and blamed a member of the school's board.[127] Because the school was concerned about the effect of the family's complaints, the school requested that the Huffstuttlers sign an agreement with the school stating that the family would "support the policies, procedures, staff, and administration of the school."[128] The family agreed to comply with the school's requirements.[129] The school board, however, later removed Preston from the school because of possible "defamatory" statements the family allegedly made about the school after the camera incident, and because the family failed to follow the school's Matthew 18 Principle of "reconciling differences" using "the proper, progressive chain of authority."[130]

Because of Preston's disenrollment, the family sued the school "for breach of contract, intentional interference with contractual relationships, outrage, and defamation."[131] A jury sided with the Huffstuttlers and awarded damages to the family.[132] The school appealed, and, citing *Watson*, argued that the Huffstuttlers' claims fell outside the court's subject matter jurisdiction because "religious, educational institutions have a constitutionally protected right to be free from civil court interference."[133]

The Arkansas Supreme Court found that courts disagreed as to whether to intervene in breach of contract and tort claims that in some way implicate religious questions.[134] Some U.S. courts determined that civil courts should refuse to intervene at all in such controversies.[135] Other courts, however, like the circuit court in *Drevlow v. Lutheran Church*,[136] refused to hear claims that implicated religious questions but agreed to adjudicate any claim that did not involve religious questions.[137] The *Huffstuttler* court agreed with *Drevlow* and

---

123. *Id.* at 61.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 66-67.
131. *Id.* at 61.
132. *Id.*
133. *Id.* at 62.
134. *Id.* at 64.
135. *Id.*
136. 991 F.2d 468 (8th Cir. 1993).
137. *Huffstuttler*, 238 S.W.3d at 64.

held that it would only refuse to hear allegations that would have involved the court too closely in religious questions.[138]

The court found that Preston was removed from school because his parents did not follow the school's Matthew 18 Principles, which were the steps that families of the school's students had to follow in order to resolve a dispute with the school.[139] The court found further that adjudicating the Huffstuttlers' contract claims against the school would have necessitated an examination by the court of the family's faithfulness to the Matthew 18 Principles in handling the camera conflict.[140] Because the court believed such an inquiry would have involved the court in ecclesiastical matters, the court held that Arkansas civil courts did not have subject matter jurisdiction over the family's claims.[141]

Despite the fact that the lower court applied a neutral principles approach,[142] the Arkansas Supreme Court in *Huffstuttler* wrote that "the judiciary cannot inquire into church matters—it is simply without jurisdiction to do so."[143] The court's holding seems particularly curious when one actually looks at the language of the Matthew 18 Principles as found in the Calvary Christian handbook.[144] The rule in question stated that families whose children attend the school must agree "[t]o carefully determine to use the Matthew 18 principle of reconciling differences by first conferring with the most immediate staff member related to the incident in question, and then only pursuing the proper, progressive chain of authority when matters are not acceptably resolved."[145] It does not seem that the court would have had "to determine whether the Huffstuttlers did, or did not, comply with Matthew 18"[146] in order to adjudicate this dispute because the school, in its handbook, went to the trouble of spelling out exactly what the school believed it meant to comply with Matthew 18 in a clear, secular manner. The court did not have to consult the text of the *Bible*; all the court had to do was determine whether the Huffstuttlers attempted to reconcile their difference with the school "by first conferring with the most immediate staff member related to the incident" with Preston.[147] Because the Huffstuttlers did not believe that the matter was "acceptably resolved," the court would then have had to determine whether the Huffstuttlers followed "the proper, progressive chain of authority" within the school in order to resolve the issue.[148] The court, it seems, could have

---

138. *Id.* at 66.

139. *Id.*

140. *Id.* at 67.

141. *Id.*

142. *Id.* at 62.

143. *Id.* Ironically, this is the same court that decided *Holiman* less than fifty years earlier, a case where the court determined that it did have jurisdiction to inquire into church matters. 366 S.W.2d 197, 199 (Ark. 1963).

144. *Huffstuttler*, 238 S.W.3d at 66-67.

145. *Id.*

146. *Id.* at 67.

147. *Id.* at 66.

148. *Id.* at 66-67.

accomplished this feat rather easily. The court would not have had to "inquire into church matters"[149] in any way in order to determine whether the Huffstuttlers had followed the method prescribed the school's handbook. All the court had to do was inquire into the school's chain of command and into the actions the family took in order to settle the dispute, just as if this dispute had arisen in a secular school.[150]

Justice Glaze's strong dissenting opinion pointed out the deficiencies in the majority's opinion.[151] First, he wrote that the court should have realized what was really going on in this case:

> [The school] placed a hidden video camera in the ventilation system of a classroom that doubles as a dressing room for . . . students. The Huffstuttlers became aware of the camera and, like any reasonable parents, demanded an explanation from the school. At first, [the school] denied the camera's existence . . . [but later] voted to disenroll Preston Huffstuttler in retaliation for his parent's continued inquiries.[152]

Justice Glaze stated that it should have been evident that the school's contentions were "nothing more than a ploy to avoid liability," and a "charade" that the court's majority did not detect.[153] As a consequence of deciding that the court did not have subject-matter jurisdiction to adjudicate the family's claims against the school, Justice Glaze wrote that "the majority has allowed [the school] and its . . . board to hide behind a religious cloak."[154] The school was able, it appears, to disenroll a student and retaliate against his family because the family blew the whistle on a school board member's disturbing behavior.[155] It is important that

---

149. *Id.* at 62.

150. It is instructive to compare the language of the Matthew 18 Principles in *Huffstuttler* with the language of the United Effort Plan Trust of the Fundamentalist Church of Jesus Christ of Latter Day Saints ("FLDS Church"), discussed extensively by Professor Andersen. The Trust was established, according to the Trust document, "to preserve and advance the [FLDS Church's] religious doctrines and goals" and "to provide for Church members according to their wants and their needs, insofar as their wants are just." Andersen, *supra* note 46, at 774 (footnotes and citations omitted). As Professor Andersen notes, "[t]he former statement obviously cannot be interpreted and applied except in terms of religious doctrine. . . . [and] the latter [statement], taken in context, requires a religious interpretation, especially in relation to the meaning of 'just' wants." *Id.* The Matthew 18 Principles, however, required no such religious interpretation because the school used secular language to explain exactly what it meant to comply with the Principles. *Huffstuttler*, 238 S.W.3d at 66-67. *See also* Weisberg, *supra* note 50, at 1000 (citations omitted) (noting that "sometimes a religious document may not be amenable to secular interpretation").

151. *Huffstuttler*, 238 S.W.3d at 71-72 (Glaze, J., dissenting).

152. *Id.* at 71.

153. *Id.*

154. *Id.* at 72.

155. *Id.* at 61 (majority opinion) (noting that a school principal acknowledged to a group of parents that the video camera was hidden in the ventilation system by a member of the school's board).

religious institutions in this country enjoy a great deal of privacy and autonomy.[156] However, religious organizations should not be allowed to get away with criminal or tortious actions simply by asserting their First Amendment rights.[157] It appears that the Calvary Christian School may have gotten away with tortious actions because of the Arkansas Supreme Court's refusal to intervene in the school's dispute with the Huffstuttlers.

B. Analysis of El-Farra v. Sayyed

In *El-Farra v. Sayyed*,[158] Monir El-Farra was an Islamic minister, or Imam.[159] Prior to this controversy, El-Farra agreed to an employment contract with the Islamic Center of Little Rock ("ICLR") which stated that he could be fired by the ICLR "'on valid grounds according to Islamic Jurisdiction (Shari'a)' upon sixty-days notice."[160]

Less than two years after El-Farra signed his contract, the parties took part in an arbitration hearing because some ICLR members complained about El-Farra's sermons and because it was alleged that El-Farra disrupted the ICLR's governance.[161] After the arbitration hearing, El-Farra received a correspondence from the ICLR President informing him "that his behavior was 'un-Islamic.'"[162] This "warning letter" provided El-Farra with a number of conditions he had to meet in order to avoid being removed from his position.[163] The ICLR, not satisfied that El-Farra had met the conditions the President set out for him, later sent El-Farra an additional letter putting him on probation for further behavior that the ICLR believed violated Islamic tenets.[164] Eventually, the ICLR fired El-Farra.[165]

El-Farra sued the ICLR and its leadership for "defamation, tortious interference with a contract, and breach of contract."[166] The ICLR claimed that an Arkansas court did not have subject matter jurisdiction over its dispute with El-Farra because civil court intervention in the dispute would involve the court

---

156. *See, e.g.*, Sirico, Jr., *supra* note 38, at 335 (citations omitted) (arguing that "[p]rotecting the autonomy of churches is a primary goal of the first amendment's religion clauses").

157. Alternatively, it could very well have been the case that the school was in the right and that the Huffstuttlers had failed to pursue their dispute by using the proper methods and going through the proper channels. However, because of the court's refusal to make a decision on the merits, we will never know.

158. 226 S.W.3d 792, 793 (Ark. 2006).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

in religious issues in violation of the First Amendment.[167] The lower court sided with the ICLR, and El-Farra appealed to the Arkansas Supreme Court.[168]

In its *El-Farra* decision, the Arkansas Supreme Court said that U.S. Supreme Court precedent mandated that U.S. courts are barred by the First Amendment from exercising jurisdiction over religious disagreements.[169] El-Farra, however, maintained that his dispute with the ICLR would not entangle the court in a disagreement over religious law, but instead was a mere breach of contract action that required nothing more than an examination of his interactions with the ICLR and its leadership.[170] Thus, El-Farra contended the court should apply a neutral principles of law approach in order to adjudicate the dispute.[171] Discussing the *Wolf* neutral principles approach, the court found that Arkansas had approved neutral principles as an allowable method only in disagreements over ownership and use of religious property.[172] The court decreed that the dispute between El-Farra and the ICLR was not a disagreement over religious property, but was, as El-Farra contended, merely a dispute over El-Farra's employment contract.[173] The court refused to assert its subject matter jurisdiction over El-Farra's claim of defamation because the allegedly defamatory statements occurred as a result of the ICLR's belief that El-Farra had not acted appropriately in his position as the ICLR's religious leader.[174] The justices believed they could not adjudicate the ICLR's alleged defamation of El-Farra "without an examination of religious doctrines, laws, procedures, and customs regarding who is and is not fit to be [an] Imam," an inquiry the court believed would violate the First Amendment.[175] The court determined that adjudicating El-Farra's breach of contract claim would require the court to decide whether the ICLR fired El-Farra for reasons that were appropriate under Islamic law, an examination that would, the court believed, impermissibly require an inquiry into a religious question.[176] The court held the same as to El-Farra's tortious interference claim.[177]

El-Farra appears to have been a more difficult case than *Huffstuttler*. In *Huffstuttler*, it appeared fairly clear that the school acted wrongfully.[178] In *El-Farra*, however, the ICLR had a long list of allegations against El-Farra[179] that, if found to be true, would likely have led to the conclusion that El-Farra's

---

167. *Id.*

168. *Id.*

169. *Id.* at 793-94 (citations omitted).

170. *Id.* at 794-95.

171. *Id.* at 795.

172. *Id.* (citing Kinder v. Webb, 396 S.W.2d 823, 824 (Ark. 1965)).

173. *El-Farra*, 226 S.W.3d at 795.

174. *Id.* at 796.

175. *Id.* at 796-97.

176. *Id.* at 795-96.

177. *Id.* at 797.

178. *See* Calvary Christian Sch., Inc. v. Huffstuttler, 238 S.W.3d 58, 71 (Ark. 2006) (Glaze, J., dissenting).

179. *El-Farra*, 226 S.W.3d at 793.

allegations against the ICLR were baseless. Moreover, the court could easily have interpreted the Matthew 18 Principles in *Huffstuttler*,[180] whereas it may have been impossible for a civil court to determine what it meant for an employee to be terminated "'on valid grounds according to Islamic Jurisdiction (Shari'a).'"[181]

What is striking about the court's decision in *El-Farra*, however, is how the court's language and reasoning were so inconsistent with the language and reasoning the *Holiman* court used. First, the court refused to apply the neutral principles approach because *El-Farra* involved a contractual dispute rather than a dispute over real property.[182] The logical grounds for this distinction are unclear. El-Farra's rights were no less important because they pertained to his employment contract rather than some real property in which he had an interest. His livelihood and reputation were at stake.[183] It may very well be the case that he did not have meritorious claims. However, to preclude El-Farra from having his claims adjudicated on the merits simply because they did not fall under the category of real property disputes is troublesome.

The court stated that it was inappropriate to adjudicate the dispute between El-Farra and the ICLR because "any determination of this claim would involve ecclesiastical issues."[184] However, in *Holiman* the Arkansas Supreme Court delved deeply into religious issues in order to determine which feuding faction were the true members of the local religious organization.[185] Furthermore, the court in *El-Farra* found that it was inappropriate to adjudicate El-Farra's defamation claim because the "allegedly defamatory statements . . . were made in the context of a dispute over [El-Farra's] suitability to remain as Imam."[186] The court believed that such an inquiry into the ICLR's statements could only be made by investigating Islamic principles in order to determine whether El-Farra's actions were appropriate for an Imam, and that such an inquiry was barred by the First Amendment.[187] This is, however, essentially the same inquiry that the court

---

180. *Huffstuttler*, 238 S.W.3d at 66-67.

181. *El-Farra*, 226 S.W.3d at 793. In this way, the language of El-Farra's contract with the ICLR was akin to the religiously-based langue of the United Effort Plan Trust of the FLDS Church, which Professor Andersen notes "cannot be interpreted and applied except in terms of religious doctrine." Andersen, *supra* note 46, at 774; *see also* Weisberg, *supra* note 50, at 1000 (citations omitted) (noting that "sometimes a religious document may not be amenable to secular interpretation").

182. *El-Farra*, 226 S.W.3d at 795; *see also* Weisberg, *supra* note 50, at 971 (citations omitted) (arguing that "civil courts should have authority to award damages for breach of contract because this secular remedy protects the cleric's contract right without interfering with the congregation's freedom to repudiate the cleric's authority").

183. *See, e.g.*, Weisberg *supra* note 50, at 969 (arguing that "[i]n cases where religious and secular rights are linked, civil courts must strive to protect the endangered secular rights without intruding into the religious realm").

184. *El-Farra*, 226 S.W.3d at 796.

185. Holiman v. Dovers, 366 S.W.2d 197, 200-01 (Ark. 1963).

186. *El-Farra*, 226 S.W.3d at 796.

187. *Id.* at 796-97.

undertook in *Holiman*.[188] In *Holiman*, the court did not have a problem tackling the issue of whether or not Dovers was fit to be the pastor of a Landmark Missionary Baptist Church.[189] Although *El-Farra* may have turned out to be a much more difficult case for the court to adjudicate than *Holiman*, the inconsistencies in the court's statements and approach cannot be ignored.[190]

C. Analysis of Belin v. West

In 1990, at the Annual Conference of the African Methodist Episcopal Church ("A.M.E. Church"), Bishop Henry Belin, Jr., did not grant Reverend G. Edward West a pastorship position within the A.M.E. Church.[191] West claimed that, prior to the Conference, Belin promised him an appointment to a particular position, and West further alleged that he detrimentally relied on Belin's alleged assurance.[192] West sued Belin, alleging promissory estoppel, and a jury awarded West $30,000.[193] Belin appealed to the Arkansas Supreme Court.[194]

The Arkansas Supreme Court found that the A.M.E. Church was organized hierarchically and had in place a decision-making body to mediate disputes.[195] West argued that an examination of the A.M.E. Church's Book of Discipline would reveal that his reliance on Belin's promise to appoint him to a pastorship was reasonable.[196] The court found that "[t]he Book of Discipline contains the law, statutes, historical statements, and guidelines for behavior for all positions in the church."[197] The court also found that the Book of Discipline set out policies and procedures concerning resolution of intrachurch disagreements, and set up an appeals process wherein the parties to the dispute could appeal a decision to the church's ultimate decision-makers.[198] Finally, the court found that the Book of Discipline mandated that an A.M.E. Church bishop consult with the church elders in order to select who should be given pastorship positions within

---

188. *Holiman*, 366 S.W.2d at 200-01.

189. *Id.*

190. The *El-Farra* court even cited *Jenkins v. Trinity Evangelical Lutheran Church*, 825 N.E.2d 1206 (Ill. App. Ct. 2005), "in which the Illinois Appellate Court extended the neutral-principles exception to a minister's discharge where the minister resigned with the agreement that he would be paid a certain guaranteed benefit for his resignation." *El-Farra*, 226 S.W.3d at 795. The *El-Farra* court, then, was aware of at least one court in another jurisdiction that applied a neutral principles of law analysis to an employment dispute between a religious leader and religious organization, but the court refused to follow suit.

191. Belin v. West, 864 S.W.2d 838, 839 (Ark. 1993).

192. *Id.* at 839.

193. *Id.* at 839-40.

194. *Id.*

195. *Id.* at 841.

196. *Id.*

197. *Id.* (italics omitted).

198. *Id.* at 841-42.

the organization.[199]

The justices found that "[i]n order to prove promissory estoppel, [West] must prove reasonable reliance on the alleged promise by Bishop Belin to appoint him to the pastorship of" a specific congregation.[200] The court believed that a determination of whether West's reliance on Belin's alleged promise was reasonable would involve the court in a deciding whether the church's beliefs and governmental structure showed that such reliance was not misplaced.[201] The court believed that an examination into A.M.E. Church tenets in order to determine whether bishops were allowed to promise placement in pastorship positions would violate the First Amendment.[202] The court therefore reversed the previous judgment in favor of West and dismissed his action against Belin.[203]

Belin was tailor-made for the application of an analysis akin to the neutral principles of law approach. The court had a document it could have examined: The A.M.E. Church's Book of Discipline.[204] Although the *Wolf* Court discussed the neutral principles approach in the context of religious property disputes,[205] which *Belin* was not,[206] it seems that the A.M.E. Church Book of Discipline[207] was, in some ways, similar to the documents the U.S. Supreme Court enumerated when describing the neutral principles of law approach.[208] Had the Arkansas Supreme Court examined the passages in the Book of Discipline regarding appointment of pastors by bishops, the court may have been able to adjudicate *Belin* similarly to how it would have adjudicated a religious property dispute. It may have been the case that the Book of Discipline was very clear on the issue of whether a bishop had the authority to promise someone a specific pastorship. If so, the court could have determined the issue without undertaking an interpretation of A.M.E. Church doctrine. If the plain language of the document stated whether a bishop could promise someone a specific pastorship, then *Belin* would not have been a case in which the court lacked the necessary competence to determine the dispute.[209] Therefore, the court should not have precluded itself from making an inquiry into the Book of Discipline. It may have been the case,

---

199. *Id.* at 842.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 841.

205. Jones v. Wolf, 443 U.S. 595, 602-03 (1979).

206. *Belin*, 864 S.W.2d at 839.

207. *See id.* at 841-42 (describing the contents of the A.M.E. Church Book of Discipline).

208. *Wolf*, 443 U.S. at 603.

209. *See, e.g.*, Adams & Hanlon, *supra* note 50, at 1291-92; Weisberg, *supra* note 50, at 964-65. Furthermore, the court even cites *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990), "in which the D.C. Circuit Court said it would not be improper for the trial court to decide a contract claim based on the allegation that the church district superintendent made an oral promise to find appellant a more suitable congregation so long as *no inquiry* into ecclesiastical matters *are required*." *Belin*, 864 S.W.2d at 842.

however, that the Book of Discipline did not address the issue of whether a church bishop was able to promise someone a specific pastorship. Or, it could have been the case that the Book of Discipline did address the issue, but only in vague, overtly religious terms.[210] If the Book of Discipline did not address the issue or addressed it in such a way that would have necessitated interpretation of religious doctrine, the court could have declined to decide the issue.

D. Analysis of Gipson v. Brown II

Gipson v. Brown II involved a rift between the congregation and elders of the Sixth and Izard Church of Christ, Inc.[211] At the time of this litigation the church operated as a nonprofit corporation.[212] The appellants belonged to the nonprofit's board, and were also church elders.[213] The appellants used their status as church elders and board members to deny the church members information regarding the church's financial situation.[214] Furthermore, the elders did not allow the church members to choose a new board.[215] The church members wanted access to the church's financial information and wanted to vote on a new board of directors because the members believed there were "discrepancies and inconsistencies" in the records of the church's finances maintained by the board members.[216]

The church members sued the elders in order to gain access to the church's books and in order to establish the right of the church members to elect a new board.[217] The members' suit relied on two Arkansas statutes, one which stated: "All books and records of a corporation may be inspected by any member for any proper purpose at any reasonable time,"[218] and another which provided: "Each member shall be entitled to one (1) vote in the election of the board of directors."[219] The church elders wanted "exemption" from these statutes because, they argued, the statutes were "in direct conflict with the scriptural duties of the elders as overseers of the flock responsible for harmony within the church."[220] The elders further argued that applying the statutes to the religious nonprofit corporation would violate the First and Fourteenth Amendments of the U.S.

---

210. *See, e.g.*, Andersen, *supra* note 46, at 774 (noting that the religiously-based language of the FLDS Church's United Effort Plan Trust "cannot be interpreted and applied except in terms of religious doctrine"); Weisberg, *supra* note 50, at 1000 (citations omitted) (noting that "sometimes a religious document may not be amenable to secular interpretation").

211. Gipson v. Brown, 749 S.W.2d 297, 302 (Ark. 1988) (Purtle, J., dissenting).

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 298 (majority opinion).

218. *Id.* at 300 (citing Ark. Code Ann. § 4-28-218(e) (West 2009)).

219. *Gipson II*, 749 S.W.2d at 300 (citing Ark. Code Ann. § 4-28-212(a) (West 2009)).

220. *Gipson II*, 749 S.W.2d at 300.

Constitution and certain provisions of the Arkansas Constitution.[221]

When this controversy initially came before the Arkansas Supreme Court in *Gipson v. Brown I*,[222] the court reversed a decision by the trial court ordering the elders to produce the church's financial records pursuant to the church members' discovery requests.[223] The case was remanded to the trial court because the Arkansas Supreme Court found that an evidentiary hearing was needed in order to decide whether the application of Arkansas nonprofit corporation statutes to the dispute between the elders and members would conflict with Church of Christ doctrine in violation of the U.S. Constitution and the Arkansas Constitution.[224] The trial court appointed a special master to determine whether the elders should provide the members with the desired financial records and allow the members to vote on a new board of directors.[225] The special master recommended to the trial court that the elders provide the members with access to the records and allow the board member election, and the trial court accepted this recommendation.[226] The elders appealed to the Arkansas Supreme Court.[227]

On appeal, the court found that the elders' contention that they should not be forced to comply with the Arkansas nonprofit corporations statutes was based on the elders' understanding of Church of Christ doctrine and practice.[228] The elders believed that, according to the New Testament, it was their job to govern the church and its members, that this Biblically-based responsibility applied to every facet of church governance, that their authority over every facet of church governance would create "harmony and unity" within the church, and that it was the duty of the members of the congregation to "obey and submit" to the elders' authority over them.[229] The court further found that the conflict between the elders and members was "essentially religious in nature," and that the court should not decide the dispute; instead, the court believed the church members and elders should resolve the dispute amongst themselves.[230] The court decreed that civil court involvement in religious matters necessitates an inquiry "into the customs, usages, written laws, and the fundamental organization of religious denominations," and that such an inquiry by a civil court "deprives [religious] bodies of the right to interpret their own . . . laws and opens the door to all sorts of evils."[231] Finding that the state's interest in administering its nonprofit corporation laws to the controversy did not override the constitutional issues inherent in intervening in a religious dispute, the court held that adjudication of

---

221. *Id.* at 298.
222. 706 S.W.2d 369, 371 (Ark. 1986).
223. *Id.*
224. *Id.* at 373.
225. *Gipson II*, 749 S.W.2d at 298.
226. *Id.*
227. *Id.*
228. *Id.* at 300-01.
229. *Id.*
230. *Id.* at 298.
231. *Id.* at 299. The court did not enumerate the "evils" it was referring to.

the disagreement by a civil court would unconstitutionally involve the Arkansas courts in religious issues.[232]

The court's decision is curious in that the justices determined to dismiss the church members' claims because the members' claims involved what the justices deemed to be "purely ecclesiastical concerns . . . ."[233] The court's decision in *Holiman* belies the court's claim in *Gipson II* that it will not adjudicate disputes that "implicate purely ecclesiastical concerns."[234] It is equally curious that the justices were not able to find "a compelling state interest" in the adjudication of the church members' claims.[235] The church members wanted to examine the church's financial records because they believed there were "discrepancies and inconsistencies" in the elders' recordkeeping.[236] Surely a state has an interest in seeing that assets of its religious organizations are not being squandered, or that donations made to religious organizations by the state's citizens are used for the proper purposes. The church members may not have been able to prevail on the merits of their claims. However, because the court determined that the state's interest in the dispute was not strong enough to warrant inquiry into what it deemed a "purely ecclesiastical" issue,[237] the church members' claims never received an adjudication on the merits by the Arkansas Supreme Court.

In his strong dissenting opinion, Justice Purtle accused the *Gipson II* court's majority of "evad[ing] the basic issue . . . ."[238] Justice Purtle pointed out that "[t]he church voluntarily incorporated itself under secular laws," and, in doing so, "open[ed] the door to examination in a legal setting of the dispute within the church concerning adherence to those state laws."[239] Because the majority refused to recognize this fact, Justice Purtle wrote, "[h]ereafter, a nonprofit corporation may decide it does not agree with the laws under which it is incorporated and simply refuse to abide by the law under the pretext of 'religious freedom.'"[240] *Gipson II* is another case where the Arkansas Supreme Court

---

232. *Id.* at 298-99.

233. *Compare id.* at 301 (finding that the issues involved in the dispute were "purely ecclesiastical"), *with* Holiman v. Dovers, 366 S.W.2d 197, 200 (Ark. 1963) (determining that the fundamental beliefs of the church at issue included the tenets "that a person who has been saved cannot later become lost, [and] the belief that the unpardonable sin (the rejection of Christ) can be committed only by the unsaved").

234. *Gipson II*, 749 S.W.2d at 301.

235. *Id.* at 300. Although the court says that the church members' provided "no evidence . . . as to a compelling state interest," (*Id.*) it seems that the court could have inferred a compelling state interest from the situation itself. *See also* Jones v. Wolf, 443 U.S. 595, 602 (citation omitted) (noting that, in the religious property dispute context, "[t]he State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively").

236. *Gipson II*, 749 S.W.2d at 302 (Purtle, J., dissenting).

237. *Id.* at 301 (majority opinion).

238. *Id.* at 302 (Purtle, J., dissenting).

239. *Id.* at 302-03.

240. *Id.* at 302.

allowed a religious organization "to hide behind a religious cloak."[241] The court did not need to make any sort of theological interpretation in order to adjudicate the dispute. It merely had to interpret and apply the language of Arkansas state statutes. The statutes seem very clear on the issue. Members of nonprofit corporations were entitled to access to the corporation's records,[242] and members were entitled to elect their own board of directors.[243] It is unlikely that the board of a non-religious nonprofit corporation could have gotten away with evading these requirements. However, because this church's board was able to put on its "religious cloak,"[244] the board could seemingly get away with whatever it wanted.

V. RECOMMENDATIONS FOR U.S. COURTS IN DEALING WITH RELIGIOUS DISPUTES

A. Recommendations for Arkansas Courts

Arkansas courts must achieve a greater level of consistency in their approach to dealing with disputes that implicate religious issues. In *Holiman*, the Arkansas Supreme Court decided a religious property dispute by examining two feuding factions' understanding of Christian doctrine in order to determine which faction constituted the true members of a Landmark Missionary Baptist Church.[245] In several other more recent disputes, however, the court determined that it did not have subject matter jurisdiction to adjudicate disputes involving religious questions.[246] There is the potential that the court's inconsistency in its approach to deciding disputes involving religious questions could undermine Arkansas's citizens' faith in the judicial system by making it appear that the court decides at random whether to intervene in religious disputes (or, even worse, that the court "plays favorites").[247] Arkansas must find a middle ground between the policy of non-intervention the court expressed in *Huffstuttler*, *El-Farra*, *Belin*, and *Gipson II*, and civil court interpretation of religious doctrine.

The Arkansas Supreme Court has already adopted the neutral principles of law approach when dealing with religious property disputes,[248] a crucial first step

---

241. Calvary Christian Sch., Inc. v. Huffstuttler, 238 S.W.3d 58, 72 (Ark. 2006) (Glaze, J., dissenting).

242. ARK. CODE ANN. § 4-28-218(e) (West 2009).

243. *Id.* § 4-28-212(a).

244. *Huffstuttler*, 238 S.W.3d at 72 (Glaze, J., dissenting).

245. Holiman v. Dovers, 366 S.W.2d 197, 201-02 (Ark. 1963).

246. *See* cases cited *supra* note 17.

247. For example, it would be difficult to explain to the Huffstuttlers why the court would refuse to interpret the Calvary Christian School's secularly-worded Matthew 18 Principles when, in deciding *Holiman*, the court heard testimony regarding eternal salvation and "the unpardonable sin." *Compare* Calvary Christian Sch., Inc. v. Huffstuttler, 238 S.W.3d 58, 66-67 (Ark. 2006), *with Holiman*, 366 S:W.2d at 200 (Ark. 1963).

248. *See* Ark. Presbytery of the Cumberland Presbyterian Church v. Hudson, 40 S.W.3d 301, 306 (Ark. 2001) (adopting expressly the neutral principles of law approach to decide religious

in achieving a consistent method of adjudicating religious disputes. Next, it is important that Arkansas courts develop and apply a form of the neutral principles approach to other types of cases involving disputes among members of religious organizations. Developing a general neutral principles of law standard should not be a difficult task for the Arkansas Supreme Court. The court can simply use its existing neutral principles property dispute cases as a blueprint of for developing a more general standard. Additionally, *Wolf* provided a blueprint[249] for Arkansas, and all other states, to follow in developing a general neutral principles approach.

In the context of religious property dispute adjudication, the *Wolf* Court allowed a civil court to examine "the langue of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property."[250] The *Wolf* Court further mandated that, if examining such documents "would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."[251] In light of the fact that the *Wolf* Court decreed that the *Watson* three-tiered approach is constitutionally allowable,[252] and in light of the fact that the *Watson* Court allowed the type of analysis the *Holiman* court undertook,[253] the language "require the civil court to resolve a religious controversy"[254] likely means something akin to "require the civil court to interpret religious doctrine." If, in adjudicating a religious dispute, a civil court would have to make some sort of theological interpretation, or if a religious document was so theologically-based as to make a "secular" interpretation impossible,[255] then the Arkansas Supreme Court could mandate that Arkansas courts refuse to intervene in the dispute. If, however, the adjudication did not require the court to engage in theological interpretation, the court could allow Arkansas courts to examine evidence akin to "the langue of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property"[256] in order to adjudicate religious disputes of all kinds.

For example, the Arkansas Supreme Court could have applied a general

---

property disputes).

249. *See* Jones v. Wolf, 443 U.S. 595, 602-03 (1979) (describing the neutral principles of law approach).

250. *Id.* at 603.

251. *Id.* at 604.

252. *See id.* at 602 (holding that "the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes").

253. *See* Watson v. Jones, 80 U.S. 679, 723 (1871); Holiman v. Dovers, 366 S.W.2d 197, 200-01 (Ark. 1963).

254. *Wolf*, 443 U.S. at 604.

255. *See, e.g.*, Andersen, *supra* note 46, at 774; Weisberg, *supra* note 50, at 1000 (citations omitted).

256. *Wolf*, 443 U.S. at 603.

neutral principles approach in order to adjudicate *Huffstuttler*. In *Huffstuttler*, school families were required "[t]o carefully determine to use the Matthew 18 principle of reconciling differences by first conferring with the most immediate staff member related to the incident . . . and then only pursuing the proper, progressive chain of authority when the matters are not acceptably resolved."[257] Applying a general neutral principles approach, the court could have examined this document because it seems similar to the writings mentioned in *Wolf*.[258] Once the court examined the document, the justices likely would have been able to see that interpreting this section of the Matthew 18 Principles would not have required the court to interpret religious doctrine because the Matthew 18 Principles said exactly what they meant in plain, secular language.[259] If, however, the document said that the family agreed to "follow *Matthew* 18 in all of its dealings with school staff," any adjudication of the dispute would have required the court to interpret the text of the *Bible*.[260] The court could have correctly found that interpretation of the text of the Bible is inappropriate for American courts and thus refused to assert subject matter jurisdiction over the dispute.

In *El-Farra*, El-Farra's contract enabled the ICLR to fire him "'on valid grounds according to Islamic Jurisdiction (Shari'a).'"[261] If the contract at issue defined the terms used in the contract, and "'Islamic Jurisdiction (Shari'a)'"[262] was one of the defined terms, the court could have utilized its general neutral principles approach and looked to the contract to see what was meant by the phrase. If the contract defined "'Islamic Jurisdiction (Shari'a)'"[263] in a completely secular fashion, the court could have determined whether El-Farra was unfairly terminated. If, however, the document did not define the term, or, if the document did define the term, but used religious language in order to do so, then the court could have easily seen that adjudicating the dispute "would require the civil court to resolve a religious controversy."[264] The court then could have declined to assert its subject matter jurisdiction over the dispute.

The court could also have applied its new general neutral principles of law approach to *Belin*. In *Belin*, the court found that "determin[ing] whether it is reasonable to rely on the promise of an A.M.E. Church bishop that he is going to appoint one to a specific pastorship" would have required an examination into the church's Book of Discipline.[265] The justices determined this inquiry would

---

257. Calvary Christian Sch., Inc. v. Huffstuttler, 238 S.W.3d 58, 66-67 (Ark. 2006).

258. *See Wolf*, 443 U.S. at 603.

259. *Huffstuttler*, 238 S.W.3d at 66-67.

260. *See e.g.*, Andersen, *supra* note 46, at 774; Weisberg, *supra* note 50, at 1000 (citations omitted).

261. El-Farra v. Sayyed, 226 S.W.3d 792, 793 (Ark. 2006).

262. *Id.*

263. *Id.*

264. *Wolf*, 443 U.S. at 604; *see also* Andersen, *supra* note 46, at 774; Weisberg, *supra* note 50, at 1000 (citations omitted).

265. Belin v. West, 864 S.W.2d 838, 842 (Ark. 1993).

violate the First Amendment.[266] What if, however, the court read the Book of Discipline and found language stating: "A bishop may not promise anyone future appointment to a specific pastorship?" Or, the court could have found language that read: "A bishop's promise of an appointment to a specific pastorship results in a binding commitment by the Church to that person." Although it is unlikely that the Book of Discipline contained such pronouncements, there was no reason for the court not to look. It was more likely the case that the Book of Discipline was silent on the subject, or that it addressed the subject indirectly using language that was religious in nature.[267] If so, then the court could have recognized the limitations of its general neutral principles of law approach and refused to assert its subject matter jurisdiction.

In *Gipson II*, the church members likely felt their suit had a good chance of success, given that there were Arkansas statutes which mandated that members of a nonprofit corporation were entitled both to a corporation's records[268] and to a vote in an election for the corporation's board of directors.[269] Because, however, the court found that "[t]he underlying dispute between the elders and the members of the church [was] essentially religious in nature," the court refused to assert its subject matter jurisdiction.[270] The *Wolf* Court wrote that courts could use "state statutes governing the holding of church property"[271] in order to decide disputes over religious property; the statutes at issue in *Gipson II*, however, governed the operation of corporations. The Arkansas Supreme Court could have easily expanded its general neutral principles approach to encompass the state statutes upon which the members relied. If the court had decided to assert subject matter jurisdiction over the controversy using a general neutral principles approach, *Gipson II* would have been an easy case. Because the statutes unambiguously stated that the church members were right to demand access to the corporation's records and to demand an election for a new board, the members would likely have prevailed.

B. Recommendations for U.S. Courts

This Note's recommendations for the courts of all other states is similar. First, any state that has not adopted the neutral principles of law approach to adjudicating religious property disputes should do so.[272] Adopting the neutral

---

266. *Id.*

267. *See, e.g*, Andersen, *supra* note 46, at 774; Weisberg, *supra* note 50, at 1000 (citations omitted).

268. Gipson v. Brown, 749 S.W.2d 297, 300 (Ark. 1988) (citing Ark. Code Ann. § 4-28-218(e) (West 2009)).

269. *Gipson II*, 749 S.W.2d at 300 (citing Ark. Code Ann. § 4-28-212(a) (West 2009)).

270. *Gipson II*, 749 S.W.2d at 298.

271. Jones v. Wolf, 443 U.S. 595, 603 (1979).

272. For example, Florida (*Mills v. Baldwin*, 377 So. 2d 971, 971 (Fla. 1979)), Iowa (*Fonken v. Cmty. Church of Kamrar*, 339 N.W.2d 810, 819 (Iowa 1983) (holding that the court's decision in the dispute would be the same under both the deference and neutral principles approach)),

principles approach is important for all states because it allows courts to both treat religious groups and secular groups similarly[273] and to protect "dissident" minority factions from "unbounded domination" by a religious organization's majority.[274] Also, neutral principles is arguably the Court's preferred method of adjudicating religious property disputes because it is the most recently adopted approach.[275]

After adopting the neutral principles approach, all states should develop and apply a form of the neutral principles approach to other cases that involve disputes amongst members of religious organizations. The *Wolf* Court has provided a blueprint for all states to follow in developing a general neutral principles approach.[276] If deciding a religious dispute does not require a court to engage in theological interpretation, the court should examine evidence similar to "the langue of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property"[277] in order to adjudicate non-property religious disputes. The courts of all states should undertake an analysis of neutral religious documents and relevant state statutes in order to adjudicate disputes involving religious organizations and issues.

The neutral principles analysis does need limiting principles. It should exclude situations where a civil court would have to make any theological interpretation, as well as situations where a religious document is so theologically-based as to make a "secular" interpretation impossible.[278] If courts

---

Michigan (*Bennison v. Sharp*, 329 N.W.2d 466, 474 (Mich. Ct. App. 1982) (holding that, although application of neutral principles of law may be appropriate in some religious property disputes, under Michigan Supreme Court jurisprudence application of the deference approach to this dispute was appropriate)), Nevada (*Tea v. Protestant Episcopal Church*, 610 P.2d 182, 184 (Nev. 1980) (citations omitted) (holding that Nevada courts "should defer to the decision of responsible ecclesiastical authorities, under the internal discipline of the organization to which the local congregation has voluntarily subjected itself.")), New Jersey (*Protestant Episcopal Church v. Graves*, 417 A.2d 19, 24 (N.J. 1980) (holding that, "[i]n the absence of express trust provisions . . . the [deference] approach should be utilized in church property disputes")), and West Virginia (*Church of God of Madison v. Noel*, 318 S.E.2d 920, 924 (W. Va. 1984) (holding that West Virginia courts were obligated to follow the decision of the "proper church authorities")) all continue to apply the deference approach in at least some religious property disputes; *see also* 2 WILLIAM W. BASSETT, RELIGIOUS ORGANIZATIONS AND THE LAW § 7:34 (2001) (stating that these states "have refused to follow the neutral principles approach").

273. *See, e.g.*, Serbian Eastern Orthodox Diocese for the U.S. and Canada v. Milivojevich, 426 U.S. 696, 734 (1976) (Rehnquist, J., dissenting); *see also* Andersen, *supra* note 46, at 769.

274. *See* Adams & Hanlon, *supra* note 50, at 1297 (quoting TRIBE, *supra* note 103, AMERICAN § 14-12, at 880) (internal quotations omitted).

275. *See* Jones v. Wolf, 443 U.S. 595 (1979); Watson v. Jones, 80 U.S. 679 (1871).

276. *Wolf*, 443 U.S. at 603.

277. *Id.*

278. *See, e.g.*, Andersen, *supra* note 46, at 774; Weisberg, *supra* note 50, at 1000 (citations

follow these limiting principles, the civil courts of all states will, using neutral principles of law, not only decide disputes involving religious issues in a consistent fashion but will also resolve disputes involving religious issues utilizing the method that best takes into account the legitimate concerns of both those who argue for the adoption of the deference approach and those who argue for the adoption of the neutral principles approach.

CONCLUSION

As it stands, Arkansas civil courts take significantly different approaches to resolving disputes that involve religious issues and organizations. In some instances, the courts make a detailed inquiry into religious questions in order to determine the true owners of religious real property.[279] In other instances,[280] however, Arkansas civil courts refuse to intervene in disputes that involve religious questions for fear that doing so would require an inquiry that is inappropriate for civil courts to make. Such inconsistent approaches to adjudicating different types of disputes involving religious organizations makes no logical sense and serves only to undermine public faith in the judicial system.

Arkansas, however, can remedy this problem. Arkansas has adopted the neutral principles of law approach to adjudicating religious real property disputes,[281] an important first step. Next, Arkansas must expand its use of the neutral principles approach to adjudications of other types of disputes involving religious organizations. The state does not have to interpret theological questions in order to do this; Arkansas can leave the interpretation of theological questions to religious organizations. Arkansas courts can, however, adjudicate religious disputes by analyzing documents relevant to the dispute in the same way a court would when it adjudicates a dispute that involves any other organization.

The civil courts of the rest of the U.S. should do the same. All courts in the U.S. should adopt the neutral principles of law approach to adjudicating religious real property disputes. All states should then expand their use of the neutral principles approach to encompass the adjudication of other kinds of religious disputes. In doing so, the civil courts of all states will not only decide disputes involving religious issues in a consistent fashion, but will also resolve disputes involving religious issues using the most fair and effective tool at their disposal.

---

omitted).

279. *See, e.g.*, Holiman v. Dovers, 366 S.W.2d 197, 200-01 (Ark. 1963).

280. *See e.g.*, Calvary Christian Sch., Inc. v. Huffstuttler, 238 S.W.3d 58, 66-67 (Ark. 2006); El-Farra v. Sayyed, 226 S.W.3d 792, 796-97 (Ark. 2006); Belin v. West, 864 S.W.2d 838, 842 (Ark. 1993); Gipson v. Brown, 749 S.W.2d 297, 301 (Ark. 1988).

281. *See* Ark. Presbytery of the Cumberland Presbyterian Church v. Hudson, 40 S.W.3d 301, 306 (Ark. 2001) (adopting expressly the neutral principles of law approach to decide religious property disputes).

"WE DON'T FISH IN THEIR OIL WELLS, AND THEY SHOULDN'T DRILL IN OUR RIVERS":* CONSIDERING PUBLIC OPPOSITION UNDER NEPA AND THE HIGHLY CONTROVERSIAL REGULATORY FACTOR

EMILY M. SLATEN**

INTRODUCTION

In July 2008, a group of fishermen celebrated a district court's decision that prohibited an oil company from drilling under a revered Michigan river.[1] The court stopped the drilling after finding that federal agencies arbitrarily and capriciously decided that the project would have no significant impact on the environment.[2] Interestingly, the fishermen, who had zealously opposed this project for years, had little influence on the court's ultimate decision.[3] This Note takes issue with this apparent irony: the affected people who voice concerns have little input on whether a project will significantly affect the quality of their environment.

Under the National Environmental Policy Act of 1969 (NEPA),[4] whether a proposed federal project will "significantly [affect] the quality of the human environment"[5] is a "threshold determination"[6] that directs an agency to develop an environmental impact statement.[7] To determine what is meant by "significantly," the executive branch's Council on Environmental Quality[8] has set

---

* Jeff Kart, *Anglers to Sue to Stop Drilling Near Mason Tract*, BAY CITY TIMES, June 8, 2005, at A1.

** J.D. Candidate, 2010, Indiana University School of Law—Indianapolis; B.A., 2007, Saint Louis University, St. Louis, Missouri.

1. *See* Anglers of the Au Sable v. U.S. Forest Serv. (*Anglers II*), 565 F. Supp. 2d 812, 840 (E.D. Mich. 2008); *see also* Sheri McWhirter, *Judge Won't Allow Drilling in Mason Tract*, THE RECORD-EAGLE, July 13, 2008, at State and Regional News.

2. *Anglers II*, 565 F. Supp. 2d at 815-16.

3. *See id.* at 827-29.

4. The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370f (2006).

5. *Id.* § 4332(C) ("[A]ll agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official . . . .").

6. William Murray Tabb, *The Role of Controversy in NEPA: Reconciling Public Veto with Public Participation in Environmental Decisionmaking*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 175, 185-86 (1997).

7. *Anglers II*, 565 F. Supp. 2d at 823-24.

8. Council on Environmental Quality, 40 C.F.R. §§ 1500.1 to -.6 (2010). The Council on Environmental Quality was created by NEPA and is authorized "to establish regulations setting forth environmental review procedures to be followed by federal agencies." Advocates for Transp. Alternatives, Inc. v. U.S. Army Corps of Eng'rs, 453 F. Supp. 2d 289, 299 (D. Mass. 2006) (citing 42 U.S.C. §§ 4342, 4344).

forth regulations which require a federal agency to consider both context and intensity of the project and has offered ten factors to evaluate intensity.[9] This Note concentrates on the fourth of these regulatory factors, "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial."[10] In focusing on what it refers to as "the highly controversial factor," this Note considers Professor William Murray Tabb's decade-old proposal in *The Role of Controversy in NEPA: Reconciling Public Veto with Public Participation in Environmental Decisionmaking*.[11] Although his proposal had little effect on the traditional interpretation of the highly controversial factor, this Note submits that now, over a decade later, the argument to include public opposition under this factor is even more persuasive. Indeed, this proposal seems even more appropriate in light of the growing criticisms of NEPA,[12] recent attention given toward advancing public participation in NEPA,[13] and increasing environmental justice concerns.[14]

Specifically, this Note focuses on a recent case applying the traditional interpretation of the highly controversial factor, *Anglers of the Au Sable v. U.S. Forest Service*.[15] As referred to in this Note, "the traditional interpretation" recognizes that highly controversial in most jurisdictions "means more than mere public opposition; it requires 'a substantial dispute . . . as to the size, nature, or effect of the major federal action.'"[16] According to this interpretation, "[a] substantial dispute exists when 'evidence, raised prior to the preparation of an [environmental impact statement] or [finding of no significant impact], casts serious doubt upon the reasonableness of the agency's conclusions.'"[17] The district judge in *Anglers* applied the traditional interpretation and declined to credit the magistrate judge's finding that significant public opposition met the

---

9. *See* 40 C.F.R. § 1508.27.

10. *Id.* § 1508.27(b)(4).

11. Tabb, *supra* note 6, at 185-86.

12. *See* Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 343 (2004); MATTHEW J. LINDSTROM & ZACHARY A. SMITH, THE NATIONAL ENVIRONMENTAL POLICY ACT: JUDICIAL MISCONSTRUCTION, LEGISLATIVE INDIFFERENCE, & EXECUTIVE NEGLECT, 10 (2001).

13. *See* COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, A CITIZEN'S GUIDE TO THE NEPA: HAVING YOUR VOICE HEARD (2007).

14. *See* Uma Outka, *NEPA and Environmental Justice: Integration, Implementation and Judicial Review*, 33 B.C. ENVTL. AFF. L. REV. 601, 602-8 (2006).

15. 565 F. Supp. 2d 812, 827-29 (E.D. Mich. 2008).

16. *Id.* at 827 (citations omitted); *see also* Nw. Bypass Group v. U.S. Army Corps of Eng'rs, 552 F. Supp. 2d 97, 135 (D.N.H. 2008) ("'Controversial' is not synonymous with 'opposition.'" (quoting Coliseum Square Ass'n v. Jackson, 465 F.3d 215, 234 (5th Cir. 2006))). *But see* San Luis Valley Ecosystem Counsel v. U.S. Forest Serv., No. 04-CV-01071-MSK, 2007 U.S. Dist. LEXIS 36242 at *32 (D. Colo. May 17, 2007) ("[E]ffects of the exchange in this case are highly controversial, as evidenced by the number of public comments received by the Agency.").

17. *Anglers II*, 565 F. Supp. 2d at 827-28 (quoting Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 736 (9th Cir. 2001)).

highly controversial factor.[18]

This Note argues that interpreting the highly controversial factor in this traditional, narrow manner limits the apparent purpose of NEPA and deprives the public of its full participation in the statute's procedures. Part I provides an overview of NEPA's history, procedural requirements, and developments, including both the beginnings of the highly controversial factor's traditional interpretation and Tabb's proposal to measure public opposition. Part II examines this interpretation in action by highlighting its irony and ineffectiveness in *Anglers*. Finally, Part III outlines the reasoning behind the traditional interpretation and revives Tabb's proposal by discussing why public opposition should be considered more fully under the highly controversial factor today. Specifically, courts should consider public opposition because the opposing public who must resort to challenging a finding of no significant impact in court faces many barriers and because the existence of opposition in a democratic society, even if ill-informed, should warrant more information and participation in decisionmaking.

I. THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969[19]

NEPA sets forth the federal government's broad approach to environmental policy, which is focused primarily on requiring agencies to consider the environmental impact or federal projects.[20] Most criticisms of this approach, however, are not aimed at NEPA itself but, rather, attack the failure of the executive and judicial branches to effectuate NEPA's purposes through its implementation.[21] In particular, federal agencies and courts have misinterpreted the highly controversial factor for decades by ignoring public opposition, thereby undermining the purposes of NEPA.[22]

A. NEPA's History and Development

Referred to as the "natural environment's Magna Carta,"[23] Congress enacted NEPA in 1969 as "the first comprehensive statement ever issued by the government articulating a stance on the environment."[24] Its passage in the late 1960s was a product of increased environmental awareness, as Congress had already passed several acts during the decade to address specific environmental

---

18. *Id.* at 828-29.

19. The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370f (2006).

20. LINDA LUTHER, ORDER CODE RL 33152, THE NATIONAL ENVIRONMENTAL POLICY ACT: BACKGROUND AND IMPLEMENTATION 1-6 (2005).

21. LINDSTROM & SMITH, *supra* note 12, at 10, 27.

22. Tabb, *supra* note 6, at 188.

23. LINDSTROM & SMITH, *supra* note 12, at 4.

24. Adrienne Smith, Note, *Standing and the National Environmental Policy Act: Where Substance, Procedure, and Information Collide*, 85 B.U. L. REV. 633, 634 (2005). For more information on NEPA's beginnings see generally LUTHER, *supra* note 20.

issues.[25] These acts, however, failed to incorporate specific issues into management of the environment as a whole.[26] With NEPA, Congress finally announced a coordinated national environmental policy.[27] In other words, "[i]t was the intention of NEPA's authors that a coordinated and comprehensive analysis of ecological and social impacts of federal decisionmaking replace the ad hoc, fragmented status quo in policy formulation."[28]

As its primary enforcer, the judicial branch has held an extraordinary role in NEPA's interpretation and implementation.[29] The Supreme Court identified NEPA's dual aims in *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*[30] First, agencies must "consider every significant aspect of the environmental impact of a proposed action."[31] Second, the agency must "inform the public that it has indeed considered environmental concerns in its decisionmaking process."[32] Because of the second aim of the statute, "NEPA has become one of the primary mechanisms through which the public is able to participate in the federal decision-making process."[33]

Unlike other environmental statutes, NEPA does not contain substantive regulations.[34] Instead, it provides a framework for promoting the environmental values it contains.[35] NEPA's stated purposes reflect these values:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council of Environmental Quality.[36]

These stated purposes indicate that NEPA's authors were concerned with not only the environment but also the human population's interaction with its environment.[37] This "harmony" presumably includes both the negative effects of

---

25. LINDSTROM & SMITH, *supra* note 12, at 18-21.

26. *Id.* at 20-21 ("Until the passage of NEPA, attempts to deal with environmental issues were routinely isolated, ad hoc, and incremental. . . . The evolution of federal institutions lacked a clear doctrine and locus of political responsibility for the whole natural environment.").

27. *Id.* at 24.

28. *Id.*

29. LUTHER, *supra* note 20, at 9-10.

30. 462 U.S. 87 (1983).

31. *Id.* at 97 (quoting Vt. Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978)).

32. *Id.* (citations omitted); *see also* Anglers of the Au Sable v. U.S. Forest Serv. (*Anglers II*), 565 F. Supp. 2d 812, 823 (E.D. Mich. 2008).

33. LUTHER, *supra* note 20, at 1.

34. LINDSTROM & SMITH, *supra* note 12, at 9.

35. *Id.*

36. The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2006).

37. *See id.*

human interaction and the welfare gained by humans who enjoy the environment.[38] Consider also Congress's declaration of national environmental policy:

> The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment . . . and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with . . . concerned public and private organizations . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . .[39]

Notwithstanding this statement of notable environmental policy, a federal agency may proceed with a project at the quality of the human environment's expense as long as it complies with NEPA's requirements.[40]

NEPA has been criticized in its execution despite its ambitious purposes and goals.[41] In *The National Environmental Policy Act: Judicial Misconstruction, Legislative Indifference, & Executive Neglect*, Matthew J. Lindstrom and Zachary A. Smith contend that both the executive and judicial branches have undermined NEPA's effectiveness by applying "a very narrow, crabbed interpretation in implementing [the Act]" and failing to recognize "the comprehensive core and long-term view embedded within NEPA."[42] They spread the blame for NEPA's failure among each branch of government.[43] Similarly, NEPA has been criticized for being a mere procedural hurdle to federal action.[44] As such, citizens may only challenge procedural defects and not substantive results of agencies' actions.[45] However, Lindstrom and Smith argue that "[t]he authors of NEPA intended more from their work than the watered-down, expensive, procedural paper chase that characterizes NEPA's implementation in federal agencies today."[46] Nonetheless, courts' decisions to treat NEPA as merely procedural have "expand[ed] the range

---

38. *Id.*

39. *Id.* § 4331(a). Congress also charged the federal government with the responsibility "to use all practicable means, consistent with other essential considerations of national policy, to . . . assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings." *Id.* § 4331(b)(2).

40. LUTHER, *supra* note 20, at 1.

41. *See* LINDSTROM & SMITH, *supra* note 12, at 10.

42. *Id.*

43. *Id.*

44. *Id.* at 27; *see also* Karkkainen, *supra* note 12, at 342-43 n.41 (citing Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) (noting "that although NEPA establishes 'significant substantive goals for the Nation, it imposes upon agencies duties that are "essentially procedural," designed to ensure fully informed decision-making'")).

45. Smith, *supra* note 24, at 636 (citing *Strycker's Bay*, 444 U.S. at 227-28).

46. LINDSTROM & SMITH, *supra* note 12, at 27.

of agency discretion and weaken[ed] NEPA's influence."[47] The argument that courts have similarly misinterpreted the highly controversial factor to exclude public opposition is yet another example of how various judicial interpretations have drastically undermined the legislative purposes of NEPA.

B. The Procedural Requirements—Significant and Environmental Impact Statements

Although NEPA embodies the legislative branch's national environmental protection goals, the executive branch's Council on Environmental Quality (CEQ) provides the regulations to implement the statute's broad aims.[48] First, the CEQ grants much discretion to any federal agency, regardless of its environmental expertise, that proposes a project with a potentially significant impact on the human environment.[49] Known as the "lead agency,"[50] the proposing agency determines whether the project will in fact have a significant impact on the quality of the human environment that would require an environmental impact statement, identifies other federal agencies to assist in developing the environmental impact statement, and decides whether to proceed with the project despite detrimental effects on the environment or disapproval of experts.[51] The CEQ directs the lead agency to classify federal actions under three categories.[52] The first category includes those actions that typically require an environmental impact statement; the second includes those that normally require neither an environmental impact statement nor an environmental assessment; and

---

47. Karkkainen, *supra* note 12, at 343.

48. LUTHER, *supra* note 20, at 1; *see* 40 C.F.R. §§ 1500-1508 (2010). The CEQ recognized its purpose:

> [NEPA] is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

Id. § 1500.1(a). The CEQ also reinforced NEPA's policy: "Federal agencies shall . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." *Id.* § 1500.2(d).

49. Wendy B. Davis, *The Fox is Guarding the Henhouse: Enhancing the Role of the EPA in FONSI Determinations Pursuant to NEPA*, 39 AKRON L. REV. 35, 37 (2006); *see also* 40 C.F.R. § 1501.5.

50. *See* 40 C.F.R. § 1508.16 (noting that "[l]ead agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement").

51. Davis, *supra* note 49, at 35-37.

52. Tabb, *supra* note 6, at 180-81 (citing 40 C.F.R. § 1507.3(b)(2)); *see also* 40 C.F.R. § 1501.4.

the third includes those that typically require an environmental assessment but not necessarily an environmental impact statement.[53] The second category, known as "categorical exclusions,"[54] includes routine agency actions with traditionally non-significant environmental impacts that are altogether exempted from the NEPA process.[55]

The lead agency's first step in the NEPA process is to develop an environmental assessment (EA),[56] a concise summary and analysis of the proposed federal action that aids in the determination of whether to prepare an environmental impact statement (EIS) or a finding of no significant impact (FONSI).[57] An EA simply determines whether a project will significantly affect the environment—"it does not balance different kinds of positive and negative environmental effects, one against the other; nor does it weigh negative environmental impacts against a project's other objectives . . . ."[58] In determining what is meant by "significantly," the CEQ directs agencies to consider both the context and intensity of the project and offers ten factors to evaluate intensity.[59]

---

53. Tabb, *supra* note 6, at 180-81 (citing 40 C.F.R. § 1507.3(b)(2)).

54. *Id.* at 181 (quoting 40 C.F.R. § 1508.4, 1507.3).

55. *Id.*

56. *See* 40 C.F.R. § 1508.9 ("Environmental assessment: Means a concise public document . . . that serves to . . . [b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or [FONSI] . . . .").

57. *See* Advocates for Transp. Alternatives, Inc. v. U.S. Army Corps of Eng'rs, 453 F. Supp. 2d 289, 299 (D. Mass 2006) (quoting 40 C.F.R. § 1508.9(a)(1)).

58. *Id.* at 301 (quoting Sierra Club v. Marsh, 769 F.2d 868, 875 (1st Cir. 1985)).

59. *See* 40 C.F.R. § 1508.27:

> Significantly as used in NEPA requires considerations of both context and intensity:
>
> (a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.
>
> (b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:
>
> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
>
> (2) The degree to which the proposed action affects public health or safety.
>
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
>
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
>
> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

If the lead agency determines that the proposed action will have a non-significant effect on the human environment, it issues a FONSI.[60] More or less, the "practical effect of a determination of 'no significant impact' is that it limits agency responsibility to investigate, study, consider alternatives to, and disclose to the public, the potential adverse effects of a project."[61]

A lead agency only develops an EIS for those projects deemed to have a significant effect on the quality of the human environment.[62] An EIS is a detailed statement that fully discloses "all information pertaining to significant environmental impacts of major federal projects for the benefit of the wider audience of the public and other governmental units."[63] But "[a]n [EIS] is more than a disclosure document. It shall be used by Federal officials in conjunction

---

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

60. 40 C.F.R. § 1508.13.

61. Tabb, *supra* note 6, at 182.

62. Anglers of the Au Sable v. U.S. Forest Serv. (*Anglers II*), 565 F. Supp. 2d 812, 823-24 (E.D. Mich. 2008). Consider also the definition of "human environment" in 40 C.F.R. § 1508.14:

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

63. Tabb, *supra* note 6, at 184 (citation omitted); *see* 40 C.F.R. § 1502.1:

The primary purpose of an [EIS] is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.

with other relevant material to plan actions and make decisions."[64] After preparing a draft EIS, an agency must invite and consider comments from other agencies and the public and must respond to those comments in its final EIS.[65] Although CEQ regulations direct agencies to involve the public in the federal actions requiring an EIS, each individual agency determines its public involvement policies in those actions that only require an EA or result in a categorical exclusion.[66] As discussed more fully below, this practice is particularly troublesome from an environmental justice perspective because traditionally most actions only require an EA.[67]

Finally, lead agencies file final EISs with the Environmental Protection Agency (EPA)[68] for its review, and the EPA may then refer matters to the CEQ if it "determines that the proposed action is detrimental to public health, welfare, or environmental quality."[69] However, the EPA need not review an EA or an agency's decision to issue a FONSI.[70] Instead, an agency's decision to issue a FONSI and not prepare an EIS is judicially reviewed under the arbitrary and capricious standard.[71] Under this standard, the court determines whether the

---

64. 40 C.F.R. § 1502.1.

65. *Id.* §§ 1503.1, 1503.4.

66. LUTHER, *supra* note 20, at 27; *see* 40 C.F.R. § 1506.6, in relevant part:

> Agencies shall:
>
> (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.
>
> * * *
>
> (c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:
>
> (1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.
>
> * * *
>
> (d) Solicit appropriate information from the public.
>
> (e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

67. *See* Outka, *supra* note 14, at 606-07.

68. 40 C.F.R. § 1506.9.

69. Davis, *supra* note 49, at 37.

70. *Id.*

71. Anglers of the Au Sable v. U.S. Forest Serv. (*Anglers II*), 565 F. Supp. 2d 812, 821 (E.D. Mich. 2008) ("Where the Court must rule based on review of administrative agency's final decision, review is governed by the Administrative Procedure Act. The APA provides that a court should set aside an agency's decision if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'") (citations omitted); *see also* Advocates for Transp. Alternatives, Inc. v. U.S. Army Corps of Eng'rs, 453 F. Supp. 2d 289, 299 (D. Mass 2006) (citing The Administrative Procedure Act of 1946, 5 U.S.C. § 706(2)(A) (2000)).

agency considered factors not intended by Congress, ignored a significant issue altogether, or provided an explanation that is either not founded in the evidence or "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[72]

C. The Highly Controversial Regulatory Factor

As mentioned above, the fourth factor agencies consider when determining whether a proposed action will significantly affect the quality of the human environment is "the degree to which the effects on the quality of the human environment are likely to be highly controversial."[73] One of the earliest cases to examine the highly controversial factor involved the Army Corps of Engineer's determination that an EIS was not necessary for the construction of a marina and piers on North Carolina's outer banks.[74] In that case, the court rejected "the suggestion that 'controversial' must necessarily be equated with opposition."[75] That court reasoned:

> The term should properly refer to cases where a substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of opposition to a use. Otherwise, to require an impact statement whenever a threshold determination dispensing with one is likely to face a court challenge would surrender the determination to opponents of a federal action, no matter whether major or not, nor how insignificant its environmental effect might be.[76]

This reasoning has influenced the majority of courts in their interpretation of the highly controversial factor today.[77] However, consider the irony in this practice—if NEPA purports to involve the public in decisionmaking, courts and agencies should in fact give weight to substantial public opposition in determining whether to develop an EIS.[78]

On the other hand, only a few courts have strayed from the traditional interpretation and substituted a more sensible approach that considers public opposition under the highly controversial factor.[79] In a case involving the exchange of federal lands for non-federal lands, the U.S. District Court for the

---

72. *Anglers II*, 565 F. Supp. 2d at 821(quoting Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

73. 40 C.F.R. § 1508.27(b)(4).

74. Rucker v. Willis, 484 F.2d 158, 159 (4th Cir. 1973).

75. *Id.* at 162.

76. *Id.* (citing Hanly v. Kleindienst, 471 F.2d 823, 830 (2nd Cir. 1972)).

77. For an analysis of courts' justifications for the traditional interpretation, see *infra* text accompanying notes 157-203.

78. Tabb, *supra* note 6, at 188.

79. *See* Heartwood, Inc. v. U.S. Forest Serv., 380 F.3d 428, 432 (8th Cir. 2004); San Luis Valley Ecosystem Counsel v. U.S. Forest Serv., No. 04-01071, 2007 U.S. Dist. LEXIS 36242, at *32-33 (D. Colo. May 17, 2007); Anglers of the Au Sable v. U.S. Forest Serv. (*Anglers II*), 565 F. Supp. 2d 812, 828 (E.D. Mich. 2008).

District of Colorado determined that the agency's decision not to develop an EIS disregarded the highly controversial factor.[80] The court acknowledged that although the focus is not generally on the project's popularity, the number of public comments indicated that the effects of the land exchange were highly controversial.[81] As discussed more fully below, Magistrate Judge Charles E. Binder in *Anglers* similarly reasoned that "the intensity of the public comment made at every opportunity makes clear that this project is 'likely to be highly controversial' within the meaning of the CEQ regulations."[82] Another court contemplated, "Even if public opposition could create a controversy, . . . If a controversy existed, it was resolved."[83] Arguably, these opinions apply a sensible interpretation of the factor and ask a reasonable question: given all of this public opposition, how could this project not be highly controversial?[84]

Professor William Murray Tabb extensively researched and analyzed this factor over a decade ago in *The Role of Controversy in NEPA: Reconciling Public Veto with Public Participation in Environmental Decisionmaking*.[85] Tabb outlined courts' interpretations of the highly controversial factor through 1997[86] and proposed a "multi-factored test" to guide courts and agencies when analyzing this factor.[87] Among other things, the test focused on the origin, quantity, and timing of the opposition and how agencies had addressed these concerns.[88] Unfortunately, courts have mostly ignored Tabb's proposal and continue to narrowly interpret the highly controversial factor today.[89]

II. *ANGLERS OF THE AU SABLE V. U.S. FOREST SERVICE*

Last summer, a group of fishermen cheered a district court's decision that

---

80. *San Luis Valley*, 2007 U.S. Dist. LEXIS 36242, at *32-33.

81. *Id.* at *32:

> The Agency also disregarded the controversial effects of the exchange. It concluded that under NEPA, the popularity and acceptance of a proposed action is not pertinent to whether an action's effects are controversial, and thus disregarded public opposition to the exchange. It is true that the focus is upon the effects of a proposed action, rather than the action's popularity as a general matter. However, the effects of the exchange in this case are highly controversial, as evidenced by the number of public comments received by the Agency.

82. *Anglers II*, 565 F. Supp. 2d at 828.

83. *Heartwood, Inc.*, 380 F.3d at 432.

84. *See Heartwood*, 380 F.3d at 432; *Anglers II*, 565 F. Supp. 2d at 828; *San Luis Valley*, 2007 U.S. Dist. LEXIS 36242, at *32.

85. Tabb, *supra* note 6.

86. Tabb identified approximately twenty cases where courts found either sufficient or insufficient controversy under the highly controversial factor. *See id.* at 188-90.

87. *Id.* at 190-91.

88. *Id.* For Tabb's test, see *infra* text accompanying notes 205-08.

89. *See, e.g.*, Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs, 524 F.3d 938, 957 (9th Cir. 2008); *Anglers II*, 565 F. Supp. 2d at 827; Nw. Bypass Group v. U.S. Army Corps of Eng'rs, 552 F. Supp. 2d 97, 135-36 (D.N.H. 2008).

federal agencies had acted arbitrarily and capriciously in not preparing an EIS before issuing a permit to drill for oil under one of Michigan's most highly regarded rivers.[90] These fishermen had zealously opposed this project for years.[91] Nevertheless, the federal district judge applied the traditional interpretation of the highly controversial factor and concluded that the magistrate judge improperly considered their opposition.[92] This case highlights the irony behind the traditional interpretation; it ignores the affected people in determining whether a project will significantly affect their environment.[93]

Moreover, *Anglers* demonstrates the urgent need for courts to reconsider their traditional interpretation of the highly controversial factor. The project in *Anglers* illustrates the nation's current quest for energy-independence, as it involved a permit to drill for oil.[94] Unfortunately, drilling for oil under Huron-Manistee National Forest in Michigan would emit odors and noise, affect visual aesthetics and recreational tourism, and disrupt wildlife and old growth forest.[95] Therefore, despite its potential energy value, many people opposed this project:

> Sure, this nation needs every drop of oil we can get. But we're not so hard up that we need to mess with one of the few truly wild areas we have left in Michigan. Once and for all, leave the Mason Tract and the area immediately around it alone. For anglers and others, that little slice of Michigan is sacred.[96]

The foresight of this newspaper editorial is profound; indeed, it is likely that drilling projects will continue to threaten highly regarded land throughout the country as the government struggles to break its dependence on foreign oil.[97] Therefore, it is even more imperative that courts reconsider their traditional interpretation of the highly controversial factor in order to grant the public a mechanism through which it may successfully participate in the development of such projects.

---

90. *See Anglers II*, 565 F. Supp. 2d at 840; *see also* McWhirter, *supra* note 1.

91. Kart, *supra* note *.

92. *Anglers II*, 565 F. Supp. 2d at 828-31.

93. *Id.*

94. *Id.* at 817-19.

95. *Id.* at 818-20.

96. Op-Ed., *Keep Holy Waters Safe from Nearby Oil, Gas Exploration*, BAY CITY TIMES, July 25, 2008, at A8.

97. Compare this project with a recent proposal to drill for uranium in Charleston, Missouri, a small town in Southeast Missouri. A Colorado geologist has worked to gain local support by setting up an office in the town to speak to the locals about the proposed project. He has asked landowners and farmers to "sign on" to the project and allow him to lease a small portion of their land to drill. Although this project does not fall under NEPA (presumably because it is not a federal action), it is a good example of how public comment and opposition when combined with further information and participation in decisionmaking can lead to successful results. *See* Holly Brantley, *Land Owners Sign Off to Let Geologist Drill for Uranium*, HEARTLAND NEWS, Oct. 9, 2008, http://www.kfvs.com/Global/story.asp?S=9153468.

A. Background, Public Comment, and Preliminary Injunction

The specific project at issue in *Anglers* involved the U.S. Forest Service's (USFS) and U.S. Bureau of Land Management's (BLM) decision to issue an exploratory gas and oil drilling permit to Savoy Energy, L.P. ("Savoy") without preparing an EIS.[98] Savoy held three federal and three state leases for subsurface oil and gas within the Huron-Manistee National Forest ("Huron Forest") totaling approximately 640 acres.[99] Savoy applied for a permit to drill a directional gas well from surface land inside the Huron Forest into its lease holdings under an area known as the Mason Tract.[100] The "development involve[d] clearing, grading, and leveling a 3.5 acre well pad, preparing a production facility approximately 1.5 miles from the well, and constructing a pipeline connecting the two locations."[101]

The Mason Tract, Savoy's "drilling target," is state-owned land named after George W. Mason who deeded the 4,700 acres to Michigan in the 1950s.[102] Mason gifted these acres on the condition that Michigan maintain the land in a natural, wilderness state.[103] According to the court, the Mason Tract is "one of the most revered sections of forest in all of Michigan."[104] The Au Sable River's South Branch, "one of the continent's most hallowed fishing sites,"[105] winds through the Mason Tract.[106] The Mason Tract was designated a "[s]emi-primitive [n]on-motorized (SPNM) area" and then an "old growth" region in 2003.[107] The Mason Tract's only development includes one campground, one log chapel, and a few unimproved, seasonably passable roads.[108] Savoy proposed to position the well pad, well head, and portion of the pipeline in the SPNM area, while maintaining the actual production facility and remainder of the pipeline outside of the SPNM area.[109] Although the proposed well site was roughly 1650 feet from the Mason Tract, Savoy also planned to develop roads within the tract for all-season travel.[110]

After completing an EA in August 2004, the USFS issued a FONSI in 2005;

---

98. Anglers of the Au Sable v. U.S. Forest Serv. (*Anglers I*), 402 F. Supp. 2d 826, 828-29 (E.D. Mich. 2005).

99. *Anglers II*, 565 F. Supp. 2d at 817.

100. *Id.* at 817-18.

101. *Id.*

102. *Id.* at 818.

103. *Id.*

104. *Id.*

105. Keith Gave, *Angry Anglers Vow Legal Fight to Stop Drilling on Mason Tract*, BAY CITY TIMES, Feb. 7, 2005, at E1.

106. Anglers of the Au Sable v. U.S. Forest Serv. (*Anglers I*), 402 F. Supp. 2d 826, 829 (E.D. Mich. 2005).

107. *Anglers II*, 565 F. Supp. 2d at 818.

108. *Anglers I*, 402 F. Supp. 2d at 829.

109. *Anglers II*, 565 F. Supp. 2d at 818-19.

110. *Anglers I*, 402 F. Supp. 2d at 829.

it did not prepare an EIS.[111] Shortly thereafter, a local newspaper reported that "[t]o the surprise of virtually no one, the federal government gave its blessing last week to a Northern Michigan-based energy company to begin exploratory drilling for natural gas."[112] Savoy apparently received a drilling permit on August 4, 2005.[113] The Anglers of the Au Sable (Anglers) and other plaintiffs filed suit on June 8, 2005, alleging that the USFS and BLM violated their duties under several federal statutes, including failing to prepare an EIS under NEPA.[114] The Anglers rightfully and passionately opposed the project arguing "[w]e don't fish in their oil wells, and they shouldn't drill in our rivers."[115] Magistrate Judge Charles E. Binder initially received the case for general case management, but the Anglers' motion for preliminary injunction temporarily withdrew the case back to District Judge David M. Lawson.[116]

In December 2005, the U.S. District Court for the Eastern District of Michigan granted a temporary restraining order and preliminary injunction to enjoin Savoy's exploratory oil and gas drilling operations in the Huron-Manistee

---

111. *Anglers II*, 565 F. Supp. 2d at 819.

112. Gave, *supra* note 105. For more newspaper coverage of this case see *Agency Delays Decision on Mason Tract Drilling*, BAY CITY TIMES, Jan. 18, 2005, at A5; John Bebow, *Well Drilling Project Stirs Refuge Issues; Mason Tract Oil and Gas Plan Spotlights Need to Protect Wilderness Areas, Senator Says*, DETROIT NEWS, July 11, 2003, at 1C; John Bebow, *Au Sable Drilling Plan Stirs Anger; Anglers Howl as Company Moves to Drill for Oil and Natural Gas Under Mason Tract*, DETROIT NEWS, June 29, 2003, at 1A; *Opposition Strong to Drilling Near Au Sable River; Foes Fear Exploratory Well Will Harm River's Quality*, GRAND RAPIDS PRESS, June 28, 2003, at D1.

113. *Anglers II*, 565 F. Supp. 2d at 819-20.

114. *Id.* at 815, 819-20. Tim Mason, George Mason's grandson, was also named as a plaintiff. *Id.* at 812. Consider Tim Mason's statement: "The Mason family has joined this fight because the Forest Service proposal goes against everything from [sic] grandfather sought to do by giving the Mason Tract to the people of Michigan." Kart, *supra* note *.

115. *Id.* The article continued:

> The plaintiffs believe plans by Savoy Energy of Traverse City to drill for oil and gas in the Huron National Forest will desecrate "one of the nation's most important conservation gems, the Mason Tract on the South Branch of the Au Sable River in Michigan—the site on which Trout Unlimited was founded." . . . [T]he Forest Service has rejected better, alternative sites and allowed Savoy to push ahead with its plans, endangering the river and ignoring thousands of comments from people nationwide who have called "for the protection of this pristine waterway, where thousands of Michiganders go fly-fishing each year."

Id.; *see also Critics File Suit Over Gas Drilling; Lawsuit Claims Project Could Ruin Tranquility of Area*, GRAND RAPIDS PRESS, June 12, 2005, at B3 ("Critics say the project could ruin the tranquillity of the area, known for its pine and hardwood stands and the Mason Chapel, an open-air church on the Au Sable riverbank.").

116. *Anglers II*, 565 F. Supp. 2d at 815; Anglers of the Au Sable v. U.S. Forest Serv. (*Anglers I*), 402 F. Supp. 2d 826, 828 (E.D. Mich. 2005).

National Forest.[117] In its order, the court identified substantial evidence that undermined the USFS's decision to issue a FONSI, including the unique geographical characteristics of both the Mason Tract and South Branch of the Au Sable; the harm to aesthetic and recreational enjoyment caused by noise, odor, and visual impacts; and the adverse impacts to the local tourism economy, old-growth area, and wildlife, including threatened or endangered species.[118] The order also cited declarations by a Professor of Forestry at the University of Michigan and a former Wildlife Chief for the Michigan Department of Natural resources, both of whom supported the Anglers' position.[119]

Perhaps even more importantly, the preliminary injunction order considered many public comments submitted to the USFS during the EA drafting process that opposed the project because of its irreparable harm to the local environment.[120] Several groups and individuals submitted comments that mostly opposed the disruption of the old-growth area and its wildlife and consequent harm to tourism and the recreational experience.[121] Those voicing their concerns about the project included: the Michigan Environmental Council; the Michigan Department of Natural Resources; the County of Crawford; several state and federal senators and representatives, including U.S. Senator Debbie Stabenow; the Michigan governor;[122] Michigan Trout Unlimited; a biology professor; and an elderly man who has enjoyed the Mason Tract for decades.[123] The court also considered the general public interest finding that "there is a strong public interest in preserving national forests in their natural states and ensuring that the dictates of NEPA are complied with."[124] With the award of the preliminary injunction, the Anglers successfully put Savoy's drilling on hold.[125]

---

117. *Anglers I*, 402 F. Supp. 2d at 828.

118. *Id.* at 832-35.

119. *Id.* at 833-36.

120. *Id.* at 837-38.

121. *Id.*

122. *Id.* Although the *Anglers I* court noted the Michigan governor's concerns in its December 2005 opinion, the following newspaper quote suggests that she may not have always publicly shared these feelings: "Now if we could just get Gov. Jennifer Granholm and others who care about this magnificent state to feel the same way, there may be a chance to get the feds who have authorized drilling for gas and oil along the hallowed Mason Tract to back off." Keith Gave, *Pristine Land Could Use Some Special Intervention*, BAY CITY TIMES, Apr. 21, 2005, at A3.

123. *Anglers I*, 402 F. Supp. 2d at 837-38.

124. *Id.* at 839 (citing Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1125 (9th Cir. 2002)).

125. Hugh McDiarmid, Jr., *Outdoors Gem Gets Reprieve; Judge: Firm Can't Clear Land for Drills*, DETROIT FREE PRESS, Dec. 8, 2005, at 3:

> Drilling for natural gas in a forest revered by anglers and solitude seekers is temporarily on hold. . . . Conservationists hailed the ruling as a victory, although it lasts only until U.S. District Judge David Lawson makes a more permanent decision on a lawsuit seeking to block the drilling. . . . The Courts are showing what Michigan anglers have known all along: that the Au Sable River is one of the most special places in our state

B. A Win for the Anglers: The Magistrate Judge's Report Requiring an EIS

With the drilling on temporary hold, the district court turned to whether the USFS had in fact acted arbitrarily and capriciously in its decision to issue a FONSI instead of preparing an EIS.[126] The Anglers ultimately succeeded in this decision because the court found that the USFS was in fact required to prepare an EIS.[127] Although the magistrate judge offered a broader interpretation of the highly controversial factor, the district judge rejected that interpretation for the traditional approach that refuses to acknowledge public opposition.[128] This case exemplifies the irony and backwardness of this interpretation.

Magistrate Judge Binder's report offered a much broader interpretation of the highly controversial factor than the traditional interpretation applied by District Judge Lawson.[129] Overall, Magistrate Judge Binder found that the USFS acted arbitrarily and capriciously in issuing a FONSI because it violated NEPA's guidelines.[130] He strongly doubted that "a gas well drilling project that admittedly would alter scenic and primitive areas for up to 30 years, double noise levels in areas isolated from human contact, involve clearing old growth forest, and emit petroleum and engine exhaust odors would [have] no significant environmental impact."[131] According to Magistrate Judge Binder, USFS paid only "lip service"[132] to at least four significant environmental impacts: "(1) the effect on visual aesthetics; (2) emission of odor; (3) noise levels; and (4) disruption of protected wildlife and old growth forest."[133] Finally, he considered the public's concern and reasonably concluded that "the intensity of the public comment made at every opportunity makes clear that this project is 'likely to be highly controversial' within the meaning of CEQ regulations."[134] Given the amount of attention awarded to public comment in Judge Lawson's preliminary injunction order and the high profile nature of the case, Magistrate Judge Binder likely believed that it was only sensible to consider public opposition under the highly controversial factor.[135]

Savoy objected to the Magistrate Judge Binder's report issued on June 20, 2006 that recommended that the court grant Angler's motion for summary

---

and shouldn't be hastily destroyed.

Id. (quotations omitted).

126. Anglers of the Au Sable v. U.S. Forest Serv. (*Anglers II*), 565 F. Supp. 2d 812, 840 (E.D. Mich. 2008).

127. *Id.* at 830-33.

128. *Id.* at 827-28. Although Magistrate Judge Binder's report was not published, District Judge Lawson sufficiently summarized his reasoning. *See id.* at 820, 828.

129. *Id.* at 828-29.

130. *Id.* at 820.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 828.

135. *See supra* text accompanying notes 120-25.

judgment and deny Savoy's cross motion for summary judgment.[136] District Judge Lawson considered the case and issued an opinion in July 2008.[137]

C. A Win for the Anglers, Sort-of: The District Judge's Decision Requiring an EIS

Although ultimately agreeing that USFS acted arbitrarily and capriciously, District Judge Lawson took issue with Magistrate Judge Binder's "highly controversial" finding.[138] District Judge Lawson recognized that the public was mostly concerned with the project's visual impact and noise.[139] For Judge Lawson, however, these concerns were not enough.[140] He wrote:

> However, the plaintiffs demonstrate only mere public opposition; they present no evidence disputing the size, nature, or effect of the project. At no point do the plaintiffs assert that the defendants failed to analyze some likely effect of the proposed drilling, nor do they challenge the credibility of the defendant's experts, data, or methodology. Instead, the plaintiffs cite general concerns about the impact of the drilling and criticisms of the EA. The plaintiffs are not entitled to manufacture controversy in such a manner.[141]

According to Judge Lawson, "requiring an EIS based on nothing more than public controversy over the significance of the effects disclosed in the EA penalizes an agency for precisely the type of candid disclosure that NEPA seeks to promote."[142] He also acknowledged that the USFS did in fact consider and respond to the public's concerns in many ways.[143] Finally, District Judge Lawson reasoned that NEPA's command is mainly procedural and because the plaintiffs produced only public opposition—not evidence of a substantial dispute or of the USFS's failure to consider public concerns—the project's environmental impact was not "likely to be highly controversial within the meaning of the CEQ regulations."[144]

Of course, a win was a win for the Anglers—"[t]he tranquility of the Holy Waters [was] once again safe from the disruption of oil and gas exploration."[145] The *Record-Eagle* reported: "Opponents of a plan to drill for natural gas beneath a wilderness area known as the Mason Tract are celebrating a federal judge's decision to block mineral exploration there."[146] The Anglers' president stated,

---

136. *Anglers II*, 565 F. Supp. 2d at 815.
137. *Id.*
138. *Id.* at 828-29.
139. *Id.* at 828.
140. *Id.* at 828-29.
141. *Id.* at 828.
142. *Id.* at 829 (citation omitted).
143. *Id.*
144. *Id.* at 829.
145. Op-Ed, *supra* note 96.
146. McWhirter, *supra* note 1.

"George Mason's gift 50 years ago is worth protecting for 50 years from now. Anything that could affect the river corridor should be highly scrutinized."[147] Yet, some criticized the federal government for failing to do its job: "[Are these] the people we rely on to protect or not our environment? . . . Retrieving oil and gas is important. The aesthetics and solitude of the land are important. Divining the place in between is too important a job to be bungled."[148]

In reality, however, the Anglers' zealous opposition played little role in convincing the court that at the very least the agencies should have prepared an EIS for the drilling project. In other words, if the agency had done an adequate job in preparing the EA and had complied with other procedural requirements, not even the massive amount of public opposition could persuade the court that the USFS had acted arbitrarily and capriciously in issuing a FONSI. Consider the irony: the very humans affected by a project cannot persuade an agency or a court that a proposed project will have a significant effect on the quality of their environment. Yet, presumably the affected people would know better than anyone else the effects of a proposed project on the quality of their environment, and if they do not yet know, they should be made aware. True, an adequate EA may consider and address many of the public's concerns,[149] but that justification is hardly sufficient to satisfy citizens who demand at least more information or investigation into a project's environmental effects and the right to participate in subsequent decision-making procedures. NEPA's authors envisioned such access.[150] Without a doubt, the Anglers and many others would find it very disheartening to know that their opposition alone could not require more environmental studies for the drilling project. Instead, they could only hope for "botched oversight."[151]

---

147. *Id.*

148. Editorial, *Botched Oversight Helps No One*, THE RECORD-EAGLE (Traverse City, Mich.), July 31, 2008, at Commentary.

149. *See* Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 970 (9th Cir. 2003) (quoted in Mont. Wilderness Ass'n v. Fry, 310 F. Supp. 2d 1127, 1144 (D. Mont. 2004)):

> Although we have not established a minimum level of public comment and participation required by the regulations governing the EA and FONSI process, we clearly have held that the regulations at issue must mean something. . . . It is evident, therefore, that a complete failure to involve or even inform the public about an agency's preparation of an EA and a FONSI, as was the case here, violates these regulations.

150. See *supra* text accompanying note 39, in relevant part: "policy of the Federal Government, in cooperation with . . . concerned public and private organizations ." *See also* The National Environmental Policy Act of 1969, 42 U.S.C. § 4332(C) (2006) ("detailed statement . . . shall be made available to . . . the public"); *id.* § 4345(2) (The CEQ shall "utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals").

151. Editorial, *supra* note 148.

III. INCLUDING PUBLIC OPPOSITION UNDER THE HIGHLY CONTROVERSIAL FACTOR

Many justifications have been given for the traditional interpretation of the highly controversial factor.[152] But they are weak when one considers the purposes and policies of NEPA.[153] The considerations that support including public opposition under the factor, conversely, effectuate NEPA's aims.[154] By revising the traditional interpretation to include opposition, the courts may grant citizens a mechanism for successfully participating in federal actions that they, as the affected people, believe will significantly affect them and their environment.

A. Arguments Against Public Opposition

In a case like *Anglers*, why did District Judge Lawson insist upon overturning Magistrate Judge Binder's finding that public opposition satisfied the highly controversial factor? From a layperson's perspective, it simply makes sense that the highly controversial factor would encompass such opposition, and this sense is only heightened when one considers the purposes and policies of NEPA.[155] Nonetheless, courts frequently cite many justifications for not considering public opposition under the highly controversial factor.[156] Most of these justifications are practical concerns that consider extra administrative costs in time, money, and resources.[157] Like most value-producing instruments, EISs are expensive and timely; typically, the thousand-page document takes years to complete and costs millions of dollars.[158] Given these figures alone, one can easily understand why agencies are rarely pushed to produce EISs. Nonetheless, many courts also provide more policy-based justifications for the traditional interpretation.[159] Yet, unlike the arguments to include opposition, none of these practical or policy considerations are wholly sufficient to justify the exclusion of public opposition

---

152. *See infra* text accompanying notes 157-203.

153. *See supra* text accompanying note 36 (NEPA's stated purposes) and *supra* text accompanying note 40 (declaration of national environmental police).

154. *See supra* note 153.

155. *See supra* note 153.

156. *See* Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1240 (9th Cir. 2005); North Carolina v. FAA, 957 F.2d 1125, 1134 (4th Cir. 1992); Rucker v. Willis, 484 F.2d 158, 162 (4th Cir. 1973); Anglers of the Au Sable v. U.S. Forest Serv. (*Anglers II*), 565 F. Supp. 2d 812, 828-29 (E.D. Mich. 2008).

157. Bradley C. Karkkainen, *Bottlenecks and Baselines: Tackling Information Deficits in Environmental Regulation*, 86 TEX. L. REV. 1409, 1409 n.6 (2008) (citing Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 917-19 & nn.64-67).

158. *Id.*

159. *See North Carolina*, 957 F.2d at 1133-34; *Rucker*, 484 F.2d at 162; Hanly v. Kleindienst, 471 F.2d 823, 830 (2nd Cir. 1972); Nw. Bypass Group v. U.S. Army Corps of Engr's, 552 F. Supp. 2d 97, 135-36 (D.N.H. 2008).

from the highly controversial factor.

First, many courts reason that considering public opposition under the highly controversial factor undermines the value of disclosure in an EA.[160] Consider again District Judge Lawson's reasoning: "requiring an EIS based on nothing more than public controversy over the significance of the effects disclosed in the EA penalizes an agency for precisely the type of candid disclosure that NEPA seeks to promote."[161] Similarly, another court reasoned, "[s]imply because a challenger can cherry pick information and data out of the administrative record to support its position does not mean that a project is highly controversial . . . . [S]uch a standard [would] deter candid disclosure of negative information."[162] However, NEPA's authors anticipated much more than mere disclosure; instead, the Act mandated public participation in federal decisionmaking.[163] Therefore, the argument that public opposition would undermine an EA's disclosure value ignores NEPA's second purpose, "to engage the public in the agency deliberative process."[164]

Second, many courts have expressed concerns over the consequences of allowing public opposition to trigger an EIS.[165] *Rucker v. Willis*[166] offered the typical justification: "to require an impact statement whenever a threshold determination dispensing with one is likely to face a court challenge would surrender the determination to opponents of a federal action, no matter whether major or not, nor how insignificant its environmental effect might be."[167] Another court reasoned, "opposition, and not the reasoned analysis set forth in an [EA], would determine whether an environmental impact statement would have to be prepared."[168] Similarly, Judge Richard Posner reasoned that most EAs are just as reliable as the "much lengthier and costlier environment impact statement. . . . [P]ublic opposition . . . cannot tip the balance. That would be the environmental counterpart to the 'heckler's veto' of First Amendment law."[169] But despite these concerns, the authors of NEPA purported to allow the public to play some role

---

160. *See Anglers II*, 565 F. Supp. 2d at 828-29; *Native Ecosystems Council*, 428 F.3d at 1240.

161. *Anglers II*, 565 F. Supp. 2d at 829 (citing *Native Ecosystems Council*, 428 F.3d at 1240).

162. *Native Ecosystems Council*, 428 F.3d at 1240:

> We decline to interpret NEPA as requiring the preparation of an EIS any time that a federal agency discloses adverse impacts on wildlife species or their habitat or acknowledges information favorable to a party that would prefer a different outcome. NEPA permits a federal agency to disclose such impacts without automatically triggering the "substantial questions" threshold.

163. *See* NEPA statutory sections *supra* note 150 and source cited *infra* note 164.

164. Tabb, *supra* note 6, at 175 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)).

165. *See* sources cited *supra* note 159.

166. 484 F.2d 158, 158 (4th Cir. 1973).

167. *Id.* at 162 (citing Hanly v. Kleindienst, 471 F.2d 823, 830 (2d Cir. 1972)).

168. North Carolina v. FAA, 957 F.2d 1125, 1133-34 (4th Cir. 1992).

169. River Rd. Alliance, Inc. v. Corps of Engr's of U.S. Army, 764 F.2d 445, 451 (7th Cir. 1985) (citations omitted).

in federal decisionmaking.[170] Even the CEQ regulations recognize that "public scrutiny [is] essential to implementing NEPA."[171] Furthermore, the EIS, not the EA, is the action-forcing mechanism of NEPA.[172] EAs were never intended to be as reliable as or take the place of EISs; an opposite view would only undermine the value of any EIS prepared for any project.

Another possible justification for the traditional interpretation is that litigation brought by the opposing public concerning the inadequacy of an EIS or failure to produce an EIS has historically delayed projects.[173] In fact, NEPA's critics often argue that the Act not only encourages the opposing public to litigate projects they hope to enjoin, but also that NEPA itself "creates a complicated array of regulations and logistical delays that stall agency action."[174] In actuality, however, litigation concerning NEPA has declined.[175] In 2004, for example, "a total of 170 NEPA-related cases were filed."[176] Eleven prompted an injunction.[177] Nonetheless, if years of litigation often delay FONSI-deemed projects like the one in *Anglers*, perhaps it is more time efficient to satisfy public opposition by preparing an EIS. This practice would only effectuate the action-forcing mechanism of NEPA and thereby facilitate public involvement. On the other hand, this alternative closely resembles Judge Posner's "heckler's veto,"[178] and even if agencies choose to avoid litigation and prepare an EIS, the public is unlikely to be adequately served by the "overly lengthy, unreadable, and unused EISs"[179] that would probably result from such thinking.

The argument that public opposition is not totally discounted in the highly controversial factor also justifies the traditional interpretation; instead, the

---

170. *See* LUTHER, *supra* note 20, at 1; *see also* 40 C.F.R. §§ 1503, 1506.6 (2008).

171. 40 C.F.R. § 1500.1(b).

172. *Id.* § 1502.1 ("The primary purpose of an [EIS] is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government."); *see also* The National Environmental Policy Act of 1969, 42 U.S.C. § 4332(C) (2006) ("[All] agencies of the Federal Government shall include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . ."); 40 C.F.R. § 1508.11 ("Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the [NEPA].").

173. LUTHER, *supra* note 20, at 2 ("Unlike other environment-related statutes, no individual agency has enforcement authority with regard to NEPA's environmental review requirements. This absence of enforcement authority is sometimes cited as the reason that litigation has been chosen as an avenue by individuals and groups . . . .").

174. *Id.*

175. *Id.* at 29.

176. *Id.* (citation omitted).

177. *Id.*

178. River Rd. Alliance, Inc. v. Corps of Engr's of U.S. Army, 764 F.2d 445, 451 (7th Cir. 1985) (citations omitted).

179. LUTHER, *supra* note 20, at 11.

opposition must focus on the technical aspects of the project.[180] Consider again Judge Lawson's reasoning in *Anglers*: "[P]laintiffs demonstrate only mere public opposition; they present no evidence disputing the size, nature, or effect of the project. . . . [P]laintiffs cite general concerns about the impact of the drilling and criticisms of the EA."[181] On the contrary, however, the Anglers did in fact submit evidence disputing the effect of the project under the traditional approach.[182] Second, if the Anglers' supposedly "mere" opposition did not meet the highly controversial factor, what level or type of controversy would?[183] At an international level, Professors John Devlin and Nonita Yap suggest that successful opposition is usually "made up of both local residents concerned about the impacts of the project on their livelihoods and intellectuals capable of contending with the technical details of the economic and environmental impacts of the project."[184] Again, it seems as though the Anglers cooperated with intellectuals (such as the Department of Environmental Quality, Michigan Environmental Council, and Michigan Department of Natural Resources).[185] Nevertheless, the court reasoned that these intellectuals focused mostly on the project's visual impact and noise—concerns that the court apparently finds unrelated to the project's size, nature or effect.[186]

Similarly, some argue that NEPA already focuses too much on adverse effects, effects that are often echoed by ill-informed public opposition, rather than broader, long-term benefits.[187] For example, Dorothy Bisbee contends that in the context of off-shore wind farms, NEPA review will likely focus more on local adverse impacts instead of regional benefits.[188] She contends that "[p]opular visual aesthetic preferences are the primary obstacle to obtaining the emission reductions and other benefits wind power offers."[189] Bisbee's article quotes arguments much like those offered by the Anglers: "I'm not against wind turbines. I'm against 130 of them over 400 feet tall right smack in the middle of one of the most beautiful places in America."[190] Cass Sunstein offers a closely

---

180. Anglers of the Au Sable v. U.S. Forest Serv. (*Anglers II*), 565 F. Supp. 2d 812, 828-29 (E.D. Mich. 2008).

181. *Id.* at 828.

182. *See id.* at 826 ("[T]he outpouring of public comments—including comments from Michigan's Governor, the County of Crawford, and the Michigan Environmental Council, among others—suggests that the project's impact on recreation and tourism could be substantial.").

183. For cases illustrating sufficient controversy, see Tabb, *supra* note 6, at 189-90.

184. John F. Devlin and Nonita T. Yap, *Contentious Politics in Environmental Assessment: Blocked Projects and Winning Coalitions*, 26 IMPACT ASSESSMENT & PROJECT APPRAISAL 17, 25 (2008).

185. *See Anglers II*, 565 F. Supp. 2d at 826.

186. *Id.* at 828.

187. *See* Dorothy W. Bisbee, *NEPA Review of Offshore Wind Farms: Ensuring Emission Reduction Benefits Outweigh Visual Impacts*, 31 B.C. ENVTL. AFF. L. REV. 349, 369 (2004).

188. *Id.* at 350.

189. *Id.*

190. *Id.* at 369 (citation omitted).

related argument.[191] He argues that because the public is often ill-informed, its involvement threatens accurate decisionmaking.[192] Although recognizing the "richness" of public judgment, he warns against relying "entirely on lay judgments, which are frequently based on confusion, ignorance, and selective attention."[193] He continues, "[w]hen those judgments are based on misunderstandings of the facts, they should play no role in policy."[194] In other words, Sunstein believes that allowing a layperson's uninformed opinion to influence the decision to prepare an EIS would serve little purpose.[195] Again, despite these concerns, the CEQ recognized the importance of public scrutiny and therefore mandated that agencies involve the public.[196]

Finally, many courts have also noted that "controversy" and "opposition" are not synonymous.[197] The court in *Rucker* rejected "the suggestion that 'controversial' must necessarily be equated with opposition."[198] Similarly, the court in *Northwest Bypass Group v. U.S. Army Corps of Engineers*[199] reasoned, "[A]s common sense dictates, the term 'controversial' is not synonymous with 'opposition.'"[200] Admittedly, the two words are not synonyms, but they are actually more similar in meaning than recognized by the courts. Compare the respective definitions of "controversy" and "oppose" found in a Merriam-Webster Dictionary: "the act of disputing or contending . . . a cause, occasion or instance of disagreement or contention: a difference marked esp. by the expression of opposing views"[201] and "to confront with hard or searching questions or objections."[202] Underlying both of these definitions is the theme of contrasting, opposing views and disagreement. Although the courts generally only recognize opposing views concerning potential environmental effects,[203] one could easily argue for an interpretation of "controversial" to include the public's opposing views toward the project in general.

---

191. Cass R. Sunstein, *Which Risks First?*, 1997 U. CHI. LEGAL F. 101, 103-05 (1997).

192. *Id.* at 104-05.

193. *Id.* at 104.

194. *Id.*

195. For more on the development of public participation in environmental decisionmaking and its problems see Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENVTL. AFF. L. REV. 263 (1999).

196. *See* 40 C.F.R. §§ 1500.1(b), 1506.6 (2008).

197. *See* Rucker v. Willis, 484 F.2d 158, 162 (4th Cir. 1973) (citing Hanly v. Kleindienst, 471 F.2d 823, 830 (2nd Cir. 1972)); North Carolina v. FAA, 957 F.2d 1125, 1133-34 (4th Cir. 1992).

198. *Rucker*, 484 F.2d at 162 (citing *Hanly*, 471 F.2d at 830).

199. 552 F. Supp. 2d 97 (D.N.H. 2008).

200. *Id.* at 135 (citing North Carolina v. FAA, 957 F.2d at 1134).

201. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 497 (3rd ed. 1961).

202. *Id.* at 1583.

203. *See* Anglers of the Au Sable v. U.S. Forest Serv. (*Anglers II*), 565 F. Supp. 2d 812, 827 (E.D. Mich. 2008).

B. For Public Opposition

William Murray Tabb's proposal to weigh public opposition under the highly controversial factor seems even more appropriate now than a decade ago considering the recent attention to public participation in NEPA and other obstacles in NEPA-related litigation.[204] In 1997, Tabb offered a "multi-factored approach . . . to guide federal agencies and reviewing courts to evaluate whether opposition to a major federal project is 'highly controversial' and therefore influences the determination of 'significance' within the meaning of [NEPA]."[205] Specifically, Tabb's approach considered:

> (1) the degree of opposition, both in quantitative and qualitative terms; (2) whether the disputed information is a matter of legitimate scientific debate regarding the potential environmental impacts of the project; (3) the stage or timing in which the disputed information is raised and whether it would serve a useful purpose in light of decisions remaining; (4) whether the agency has a reasoned plan of mitigation to speak to the issues raised in opposition to the action; and (5) whether the dispute involves a matter of objective environmental effects or an issue of a subjective nature, such as aesthetics.[206]

Note that Tabb did not suggest that any opposition should automatically trigger the preparation of an EIS or propose to eliminate agencies' roles in decisionmaking.[207] Instead, "[t]he methodology proposed reconciles the twin aims of the statute and reinforces the role of active and meaningful public participation."[208] Now consider how the public will benefit from either Tabb's proposal or some variation of a new approach and why a new approach is more likely to succeed at this time.

First, a proposal to abandon the traditional interpretation and adopt a Tabb-like approach is more likely to succeed now because a recent publication suggests that even the CEQ is concerned with public involvement and has recognized that the forty-year-old Act must be modernized.[209] In December 2007 the CEQ expressed its concern with ensuring public participation in the NEPA process in its publication "A Citizen's Guide to the NEPA: Having Your Voice Heard."[210]

---

204. *See* Tabb, *supra* note 6, at 175; *see also infra* text accompanying notes 209-63.

205. Tabb, *supra* note 6, at 231.

206. *Id.* at 190-91.

207. *Id.* at 231. In fact, Tabb reassured that "[a]gencies still would retain considerable discretion regarding procedural implementation and substantive decisionmaking; however, that discretion would be tempered by the idea of fully considering relevant disputed information." *Id.*

208. *Id.*

209. *See* COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 13; *see also* THE NEPA TASK FORCE REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY, MODERNIZING NEPA IMPLEMENTATION (2003).

210. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 13. This publication was likely influenced by a 1997 CEQ study of public stakeholders who felt that some EAs were developed specifically to avoid the public, that NEPA was too often a "one-way communication process," and

The guide was "developed to help citizens and organizations who are concerned about the environmental effects of federal decisionmaking to effectively participate in Federal agencies' environmental reviews under the National Environmental Policy Act (NEPA)."[211] It instructs the public on proper timing and method of involvement and even advises on what to do if involvement is not going well.[212] But the guide also warns: "[public comment] is not a form of 'voting' on an alternative. The number of negative comments an agency receives does not prevent an action from moving forward."[213] Apparently, although public comment is so highly encouraged that the CEQ felt compelled to publish a handbook, the court in *Anglers II* makes clear that only public comments focused on specific, technical aspects of the project ultimately matter.[214] Moreover, the public has little incentive to provide comments when they have little effect on the actual decision-making process.

In addition to this recent publication, several other considerations support overturning the traditional interpretation and weighing public opposition under the highly controversial factor. These considerations include: the fact that very few EISs are actually prepared,[215] which suggests an overall weakening of NEPA caused by statutory misinterpretation; the numerous barriers that plaintiffs who judicially challenge agencies' decisions must face;[216] the argument that many agencies who decide to issue FONSI have no environmental expertise;[217] and the increasingly widespread theories of environmental justice and democracy.[218] These issues, when considered together, greatly support the argument to include public opposition under the highly controversial factor. The opposing public must play a role before the agency's decision not to prepare an EIS because the public is often left afterwards with no remedy.

Bradley Karkkainen has identified a major problem within NEPA today: "[m]ost NEPA compliance effort[s] these days [go] not into producing full-scale EISs, but into producing slimmed-down documents called environmental assessments (EAs), designed to produce just enough information to justify a 'Finding of No Significant Impact' (FONSI) to get the agency off the hook."[219] The CEQ has calculated the total number of draft and final EISs prepared from

---

that comments were sought only after the decision-making process had effectively concluded. LUTHER, *supra* note 20, at 30-31.

211. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 13, at 1 (citing National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (2006)).

212. *Id.* at 21-30.

213. *Id.* at 27.

214. Anglers of the Au Sable v. U.S. Forest Serv. (*Anglers II*), 565 F. Supp. 2d 812, 828 (E.D. Mich. 2008).

215. Karkkainen, *supra* note 12, at 347-48.

216. *See infra* text accompanying notes 225-39.

217. Davis, *supra* note 49, at 35.

218. *See infra* text accompanying notes 246-63.

219. Karkkaninen, *supra* note 12, at 347.

1973-2007.[220] Federal agencies prepared 2,036 EISs in 1973, as compared to 557 EISs in 2007.[221] Consider another comparison: 50,000 EAs leading to FONSIs versus roughly 500 EISs are produced each year.[222] Thus, it seems that EISs, the "operative, action-forcing mechanism of NEPA," are infrequently produced.[223] These statistics likely result from the sources of criticism noted earlier by Matthew Lindstrom and Zachary Smith, specifically that both the executive and judicial branches have undermined NEPA's effectiveness by applying "a very narrow, crabbed interpretation in implementing" the Act and failing to recognize "the comprehensive core and long-term view embedded within NEPA."[224] Therefore, if the courts and agencies were to begin to interpret the highly controversial factor to include public opposition, it is likely that agencies would produce more EISs and thereby advance the purposes of NEPA.

Next, the opposing public who must resort to judicial review of an agency's decision not to prepare an EIS faces several barriers. Unlike other environmental statutes, NEPA does not provide for "citizens' suits," which confer standing for injured citizens who can demonstrate that an agency violated NEPA.[225] Consequently, citizens must prove standing through the Administrative Procedure Act (APA).[226] In general, standing requires proof of three elements: injury in fact that is concrete, particularized, and imminent; fairly traceable causation; and redressability.[227] However, Adrienne Smith has recently noted the split between the courts over conferring standing in broad, policy-based NEPA suits.[228] Finding fault with both sides' approaches, Smith contends that standing in the NEPA context should extend to the full Constitutional limits: "[t]he better standing

---

220. COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, ENVIRONMENTAL IMPACT STATEMENTS FILED 1973 THROUGH 2007 (on file with author).

221. *Id.*

222. Karkkaninen, *supra* note 12, at 347-48 (citing COUNCIL ON ENVIRONMENTAL QUALITY: 25TH ANNIVERSARY REPORT 51 (1994-1995)). In addition, Karkkaninen explains that because draft EISs precede final EISs, "this figure really represents approximately 250 federal actions per year that trigger the EIS production process—a vanishingly small number given the scale and scope of federal operations." *Id.* at 348.

223. LINDSTROM & SMITH, *supra* note 12, at 63.

224. *Id.* at 10.

225. *Id.* at 103 ("Legal standing is the broad threshold requirement that plaintiffs must satisfy in order to present their case in court.").

226. *Id.* at 105. See The Administrative Procedure Act, 5 U.S.C. § 702 (2000), in relevant part: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

227. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). This Note does not provide a historical development or analysis of standing in environmental litigation. For more on standing under NEPA see LINDSTROM & SMITH, *supra* note 12, at 104 n.7; Davis, *supra* note 49, at 44-47; and Smith, *supra* note 24.

228. Smith, *supra* note 24, at 637-38 ("Specifically, the courts disagree as to the [sic] how specific the plaintiff's evidence must be to prove the plaintiff is at risk of suffering future environmental harm.").

approach would allow plaintiffs to sue under the theory that an agency harms individuals and organizations when it deprives them of information that NEPA requires the agency to disseminate. . . . [C]ourts should evaluate standing in light of NEPA's core informational objectives."[229] The argument to include public opposition under the highly controversial factor is closely related. Because "informational injury" standing is not widely recognized by the courts, the opposing public who is denied both subsequent information and participation by an agency's decision not to prepare an EIS faces a higher standing burden if it chooses to pursue litigation.[230] Lack of standing could help explain why there has been less NEPA litigation recently.[231]

The fact that citizens must sue under the APA is also significant in determining the court's standard for review.[232] Although somewhat ambiguous, the APA generally provides that courts review agencies' actions or inactions under some sort of arbitrary and capricious standard.[233] To be upheld, the APA "requires that the federal agency's final decision not be 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.'"[234] Like the standing split mentioned above, however, different courts apply either more demanding or more deferential versions of the arbitrary and capricious standard.[235] The more demanding "hard look" approach offers a two-fold analysis: first, "whether the agency took a 'hard look' at the possible effects of the proposed action. . . . Second, . . . whether the agency's decision was arbitrary and capricious."[236] On the other hand, the more literal approach is very deferential to agencies' decisions.[237] Regardless of the approach, Korey Nelson recognizes that "[t]he purpose of the EIS goes unfulfilled if agencies do not 'carefully consider' the impacts of their action."[238] The courts therefore must strike the proper balance between analyzing the appropriateness of agencies'

---

229. *Id.* at 638, 653; *accord* Davis, *supra* note 49, at 46.

230. Smith, *supra* note 24, at 638-39.

231. *See* LUTHER, *supra* note 20, at 29 (noting two possible reasons for decline in NEPA litigation, "improved agency compliance" and fewer "major federal actions" under NEPA). In addition to these reasons, some decline in NEPA litigation may stem from the court's refusal to permit individuals to sue for informational injury and NEPA plaintiff's difficulty meeting Lujan standing requirements. *See* Smith, *supra* note 24, at 652-55.

232. *See* The Administrative Procedure Act, 5 U.S.C. § 706 (2000). For more on judicial review of NEPA actions, see Korey A. Nelson, Comment, *Judicial Review of Agency Action Under the National Environmental Policy Act: We Can't See the Forest Because There Are Too Many Trees*, 17 TUL. ENVTL. L.J. 177 (2003).

233. Nelson, *supra* note 232, at 181-83.

234. LINDSTROM & SMITH, *supra* note 12, at 114.

235. Nelson, *supra* note 232, at 198-99.

236. Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997) (citing Vill. of Grand View v. Skinner, 947 F.2d 651, 657 (2d Cir. 1991)).

237. Nelson, *supra* note 232, at 187-90.

238. *Id.* at 198 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)).

actions while remaining deferential. As a result, the public who opposes a project and decides to challenge the issuance of a FONSI in court must overcome imposing barriers—merely getting into court is difficult enough, but actually getting an agency's decision overturned under the arbitrary and capricious standard depends on the court's level of deference to the agencies.[239]

The courts' tendency to defer to agencies' findings raises yet another consideration relating specifically to an argument supporting the traditional interpretation.[240] Admittedly, the public, who is not informed or who may be misinformed on environmental matters, may do little to contribute to accurate decisionmaking. Yet, as Professor Wendy Davis points out, often the agencies in charge of deciding whether or not to prepare an EIS also lack environmental knowledge.[241] She recognizes, "[m]any of these FONSI determinations are made by lead agencies without environmental expertise . . . ."[242] Davis also asserts, "Federal agencies, which lack environmental expertise, and whose mission is not environmental protection, should not have the power to determine whether their proposed projects will harm the environment."[243] Davis proposes to require EPA approval for each FONSI determination.[244] She argues three points: courts should not be required to order agencies to prepare EISs because it wastes resources; public suits are inefficient and often unsuccessful at challenging FONSI determinations; and most interestingly, "the results of NEPA court challenges are currently politically motivated."[245] However, including public opposition under the highly controversial factor could help to resolve Davis's concerns. There would likely be less FONSI-related suits because of increased EISs, less waste of judicial resources, and even more public opposition to politically-motivated outcomes.

Finally, the increasing prominence of environmental justice and democracy theories supports considering public opposition under the highly controversial factor.[246] Most federal actions result in EAs, not EISs, as noted above.[247] This fact is troublesome because "[a]lthough NEPA regulations call on agencies to involve the public in preparing EAs, public participation is only required by NEPA *after* the EA is completed, through the notice and comment provisions for

---

239. *See* Smith, *supra* note 24, at 652 (noting that under the additional Lujan approach, NEPA plaintiffs struggle to tie standing to the risk of environmental injury because they are not suing to enforce substantive NEPA requirements; indeed, NEPA contains no substantive requirements); *see also* Nelson, *supra* note 232, at 198-99.

240. *See supra* text accompanying notes 187-96.

241. Davis, *supra* note 49, at 47.

242. *Id.* at 48.

243. *Id.* at 35.

244. *Id.* at 72.

245. *Id.* at 43.

246. Environmental justice theory acknowledges that "exposure to environmental hazards is related to race and income levels." Outka, *supra* note 14, at 602.

247. *See supra* text accompanying notes 219-23.

an EIS."[248] As a result, if the highly controversial factor ignores public opposition and no EIS is prepared, then the opposing public loses its opportunities to access more information or participate in any further decisionmaking.[249]

The preparation of EISs advances environmental justice by facilitating fairness in the decision-making process and highlighting discriminatory results.[250] Professor Alice Kaswan asserts that NEPA, specifically through its EIS requirement, provides "opportunities for increased information and participation that . . . could facilitate a community's ability to understand and critique an agency's decisionmaking process."[251] In particular, the EIS may reveal information concerning the project's inappropriate location or underlying unfairness and thereby provide the community with reason to question the agency's motives behind its decision.[252] Kaswan articulates related environmental justice concerns, "[t]he information developed throughout the environmental review process may show that the purported rationale is simply a pretext masking a discriminatory decision."[253] As a result, the public may use participation in the EIS process to raise broader political concerns and bring attention to injustices.[254] A decision to issue a FONSI, however, limits the public's access to information and participation, and therefore concerns of broader political injustice must be raised through litigation. Factoring public opposition into the EIS determination will likely produce two positive outcomes. First, the likelihood of increased numbers of EISs will result in more information being disseminated to the public and additional public participation. Second, at the very least, the public will gain some satisfaction in knowing that its opposition played a role in determining whether the project would significantly affect the human environment.

Moreover, both the agencies and the public must initiate changes in order to

---

248. Outka, *supra* note 14, at 608. Some courts however have responded to this disparity by offering rules regulating the level of public participation required in the EA process. Consider this adopted rule: "An agency, when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process." Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Engr's, 524 F.3d 938, 953 (9th Cir. 2008).

249. "From an environmental justice perspective, this is troubling, because if the agency issues a FONSI without public involvement in its EA process, no meaningful opportunity remains." Outka, *supra* note 14, at 608.

250. Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221, 233, 289-97 (1997).

251. *Id.* at 289-90.

252. *Id.* at 291-94 ("[A] community may be able to use an EIS to show that the selection of the proposed site does not make sense, whatever the purported rationale of the decisionmaker.").

253. *Id.* at 293.

254. *See id.* (quoting Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53, 87 (1996)).

participate most effectively in EIS determination or preparation.[255] Professor John S. Applegate recognizes that too often notice-and-comment procedures, like those employed in preparing EISs, result in "decide, announce, and defend. That is, the agency makes its decision internally, announces it to the public only nominally as a proposal, and then defends its proposal against criticism rather than seriously reexamining it in light of comments."[256] Applegate, however, proposes changes to enhance public participation.[257] First, he suggests that procedures should strive to include those people who are limited in their ability to participate, like minorities.[258] Next, the procedures must not only provide information, but also teach the uninformed or ill-informed public.[259] He warns, "The proverbial playing field will never be truly level between persons with many and those with few resources, but the latter can learn enough to participate meaningfully."[260] Third, the procedures should be transparent so that the public can understand its role in both the participation and decision-making processes.[261] Finally, the participating public should influence the outcome.[262] In sum, every aspect of the public impacted by the agency action should have a role; have awareness of its role and influence; possess information and tools to make use of the information; and influence the outcome of the decision-making process.[263]

CONCLUSION

Too often federal agencies issue FONSIs and do not develop EISs in light of substantial public opposition. This result is facilitated by the traditional interpretation of the highly controversial factor. Through traditional interpretation of this factor, courts have negated the major goal of NEPA by depriving the public of both further information about proposed actions' environmental effects and participation in the decision-making procedures of those actions.

The irony of the factor's traditional interpretation was recently highlighted in a case involving fisherman and drilling for oil under a revered Michigan river. Despite their zealous opposition, the fisherman had little influence on the court's ultimate decision that the project would have a significant impact on the quality of the human environment. In other words, the affected people, who would

---

255. John S. Applegate, *Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 952-53 (1998).

256. *Id.* at 908.

257. *Id.* at 952-53.

258. *Id.* at 952.

259. *Id.*

260. *Id.*

261. *Id.* at 953.

262. *Id.*

263. *Id.* at 952-53. On the proper timing of participation, Applegate advises, "Participation should begin early in the decisionmaking process, when outcomes are most flexible, and it should permit actual dialogue between the decisionmaker and interested parties, and among interested parties." *Id.*

presumably know better than anyone else the environmental effects or who at least deserve to know those effects, had little input whether a project would significantly impact their environment. The traditional interpretation therefore results in illogical, ineffective outcomes that do little to advance the purposes of NEPA. As a result, the courts should reconsider this failing interpretation and adopt a broader view that encompasses public opposition.

Over a decade ago, William Murray Tabb offered a five-factor test for incorporating public opposition into the highly controversial factor, but both agencies and courts have basically ignored his proposal. In light of more recent developments concerning public participation in NEPA and environmental justice issues, perhaps now the courts will heed Tabb's advice and revise their interpretation of the factor. Again, Tabb did not advance and this Note does not propose that any opposition should trigger an EIS, and neither suggests that public opposition should ultimately determine the fate of a project. Nonetheless, the amount of public opposition and concerns raised should at the very least have some role in determining whether a project significantly affects the quality of the human environment.

In the wake of substantial opposition to a proposed project, the public deserves even more information and access to decision-making procedures—an end that is best achieved in NEPA through the preparation of an EIS. Moreover, that the public is not informed or may be misinformed on environmental matters is all the more reason to provide information. Thomas Jefferson spoke of this idea most eloquently:

> I know no safe depositary of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education.[264]

If an EA is nonetheless prepared and found adequate by the court, the opposing public is left helpless. Certainly, in that situation, the Anglers would have faced the choice of continuing to fish in a once-revered, now oil-stained river or finding someplace equally magnificent to fish—provided any such sites still existed.

---

264. Jefferson on Politics and Government: The Safest Depository, http://etext.virginia.edu/jefferson/quotations/jeff0350.htm (last visited Mar. 1, 2009).